TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1906.

No. 558. 188.

THE UNITED STATES, APPELLANT,

v.

THE BETHLEHEM STEEL COMPANY.

APPEAL FROM THE COURT OF CLAIMS.

FILED JANUARY '22, 1906.

(20060)

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In the Court of Claims of the United States.

E BETHLEHEM IRON COMPANY
v.
THE UNITED STATES. } No. 22628.

I. *Petition.*

(Filed September 16, 1901.)

the honorable the Chief Justice and judges of the Court of Claims:

The claimant respectfully shows:

1. The claimant is a corporation duly incorporated under the laws of State of Pennsylvania, having its principal place of business in the n of South Bethlehem in said State.

2. On or about April 4, 1898, the claimant and the United States ered into a contract, a copy of which is hereunto annexed, marked Exhibit A," and made part hereof, whereby the claimant, among other ngs, agreed:

'That the claimant would manufacture for and deliver to the United tes free on board the cars at South Bethlehem, six disappearing gun carriages for 12-inch breech-loading rifles for the sum of thirty-six thousand dollars each, the said carriages to be constructed in accordance with instructions, specifications, and drawings attached and forming part of the said contract, the first carriage to be com-ted and delivered within four months from the date of the contract, l the remaining five carriages within six months from the date thereof; t all work done under the contract at all stages of its progress should s the inspection prescribed by the contract, and be approved by cers of the Ordnance Department before being accepted by the United tes; that all details of construction or design of the said carriages uld be subject, without additional cost to the United States, to such ght changes, not materially affecting the cost of the work, as the Ord-nce Department might order as the work progressed; that changes terially affecting the cost of manufacture should, if they increased the l cost, be paid for by the United States, and, if they decreased the l cost, should be allowed for by the claimant at sums satisfactory the Chief of Ordnance, and that if changes so ordered by the Ord-nce Department caused delay in the completion of the contract, or if claimant sustained losses of material provided by it for the said gun riages, the claimant should be allowed a reasonable amount of time addition to that prescribed in the contract within which to complete l deliver the said gun carriages; that if any of the said gun carriages uld not be delivered by the claimant at the time prescribed by the ntract, and the Chief of Ordnance should so order, there should be ducted from the contract price a penalty at the rate of thirty-five dol-s per day for each day of delay in the delivery of the gun carriage, l all penalties so incurred by the claimant should be set off against yments to be made under the contract by the United States."

The United States by the said contract agreed to pay the
3 claimant the sum of thirty-six thousand dollars ($36,000) for each one of the said gun carriages, in installments payable as follows: "twenty-five per centum of the price of each gun carriage upon the final acceptance of the material to be used in the construction thereof; fifty per centum of the price upon the completion and delivery of the gun carriage; and the remaining twenty-five per centum upon its final acceptance."

3. Thereafter the claimant procured all materials required to construct the said gun carriages, and proceeded with the work of manufacturing the same, and, except in so far as the claimant was hindered and delayed by losses of materials which had been provided for the said gun carriages and by changes in the plans or construction of the said gun carriages ordered by the Bureau of Ordnance, and by other acts or omissions of the United States, it did and performed all acts and things which by the said contract it had undertaken to do and perform, and completed the said six gun carriages and delivered them to the United States and the United States has finally accepted the same.

4. The completion and delivery of each of the said gun carriages was delayed for the period next hereinafter named, to wit:

1st	carriage,	177 days.
2d	"	187 "
3d	"	165 "
4th	"	188 "
5th	"	175 "
6th	"	204 "

But all of the said delays were occasioned by losses of material caused by changes in the plans or construction of the said gun carriages, from time to time ordered by the Chief of Ordnance, which materially
4 increased the time required to complete them. The claimant was in no wise responsible for the said delays nor subject to have any deduction made from the contract price to be paid by the United States for the said gun carriages or any one of them.

5. On June 28, 1901, the claimant having delivered the said six gun carriages to the United States and performed all other things which by its said contract it had undertaken to do and perform, and the United States having finally accepted all of the said gun carriages, and the claimant having been paid by the United States the sum of $162,000 in several part payments made on account of the contract price of the said gun carriages, became entitled to receive from the United States the balance of the said contract price, namely, the sum of $54,000, and the claimant demanded payment of the same, but the United States refused to pay the claimant the amount of the said balance, and offered to pay the sum of $33,000, in full settlement thereof, maintaining that the claimant was subject to penalties for delays in the delivery of the said gun carriages to the amount of $21,000; whereupon the claimant duly protested against the refusal of the United States to pay the whole of the said balance, and duly protested against the said deduction therefrom of the said sum of $21,000, but the United States, contrary to the terms of its said contract, refused to allow the claimant a reasonable extension of the time pre-

scribed for the completion and delivery of the said gun carriages, to cover the delays caused by acts of the United States as aforesaid, and the claimant, being unable to secure the payment of the whole of said balance, received from the United States the said sum of $33,000 and receipted for the same, subject, however, to its said protest, whereby it reserved the right to claim, sue for, and collect the said sum of $21,000, unlawfully withheld from it as aforesaid.

5 6. The claimant is the owner and the only person interested in the claim above set forth, and no assignment or transfer of the same or any part thereof, or interest therein has been made. The claimant is justly entitled to receive from the United States under its said contract the sum of $21,000, after allowing all just credits and offsets. The claimant has made due demand upon the United States for the payment of the said sum, but the same has not been paid nor any part thereof. The claimant has always borne true allegiance to the Government of the United States, and has not in any way aided, abetted, or given encouragement to rebellion against it.

Wherefore the claimant prays for judgment against the United States in the sum of twenty-one thousand ($21,000) dollars, and for such further relief as it may be entitled to receive both at law and in equity in the premises.

THE BETHLEHEM IRON COMPANY,
By ROBERT P. LINDERMAN, *President.*

McCAMMON & HAYDEN,
Attorneys for Claimant.

STATE OF PENNSYLVANIA,
County of ———, *ss:*

Robert P. Linderman being duly sworn, deposes and says that he is the president of the Bethlehem Iron Company, the claimant named in and which subscribed the foregoing petition; that he has read the same and knows the contents thereof, and that the facts therein stated are true to the best of his knowledge and belief.

Subscribed and sworn to before me this 16th day of August, 1901.

My commission expires January 31, 1903.

[SEAL.] HORACE DISBROW REEVE,
Notary Public.

6 EXHIBIT "A."

Copy.
(Form 23.)

ORDNANCE DEPARTMENT, U. S. A.

Articles of agreement entered into this fourth day of April, eighteen hundred and ninety-eight, between The Bethlehem Iron Company, of South Bethlehem, in the county of Northampton, State of Pennsylvania, of the first part, and the United States, by Brig. Gen. D. W. Flagler, Chief of Ordnance, U. S. Army, acting under the direction and by authority of the Secretary of War, for and in their behalf, of the second part.

1st. This agreement witnesseth, that the said parties of the first part, for themselves and their successors, &c., and the said party of the second part, for and in behalf of the United States of America, have mutually agreed, and by these presents do mutually covenant and agree, to and with each other as follows, viz:

Under advertisement dated , 189 , the said parties of the first part do hereby contract and engage with the said United States to manufacture, for the Ordnance Department, U. S. Army, in accordance with said instructions to bidders as amended, specifications and drawings, all of which are hereto attached and form part of this contract.

Six (6) disappearing gun carriages, model 1896, for 12-inch B. L. rifles, drawings dated April 27 and June 19, 1896 (latest revision July 14 and December 30, 1897), at thirty-six thousand dollars ($36,000) each, free on board cars at South Bethlehem, Pa.

The first carriage to be delivered within four (4) months from date of this contract, and the remaining five (5) carriages within six (6) months from date of this contract.

7 It is further stipulated and agreed that the party of the first part will furnish such limited additional number of these carriages, at the price and rate of delivery stated, as the party of the second part may desire, under available appropriations.

It is further stipulated and agreed that all details are to be subject to such slight changes, not materially affecting the cost of the work, as the Ordnance Department may wish to make as the work progresses, and any changes materially affecting the cost of manufacture are to be paid for, if increasing, and allowed for if decreasing, the said cost, at a price to be satisfactory to the Chief of Ordnance. If these changes cause delay in the completion of this contract a reasonable allowance of time therefor shall be made.

It is further stipulated and agreed that if any carriage herein contracted for is not delivered by the party of the first part at the times specified herein, there will be deducted, in the discretion of the Chief of Ordnance, thirty-five ($35) dollars per day from the price to be paid therefor for each day of delay in delivery of each carriage, respectively. But if at any time the Chief of Ordnance shall decide that continuous and great delay or other serious default has occurred, he may, to protect the interests of the United States, apply the provisions of the 5th section of the regular contract form and waive further per diem deduction in price.

All penalties incurred under this contract shall be offset against any payments falling due to the said party of the first part.

The work must pass the required inspection at all stages of its progress, and be approved by the officers of the Ordnance Department before being accepted and paid for by the United States.

8 It is further stipulated and agreed that payment for the carriages herein contracted for shall be made as follows, viz:

Twenty-five (25) per cent of the price of each carriage will be paid upon the provisional acceptance of material of the value of all the material therefor, fifty (50) per cent upon delivery of the completed carriage, and twenty-five (25) per cent upon its final acceptance.

If any doubts or disputes arise as to the meaning of anything in this or any of the papers hereunto attached and forming this contract, the

matter shall be at once referred to the Chief of Ordnance, U. S. Army, for determination. If, however, the party of the first part shall feel aggrieved at any decision of the Chief of Ordnance, it shall have the right to submit the same to the Secretary of War, and his decision shall be final.

2d. All the carriages herein contracted for shall be delivered by the said parties of the first part as aforementioned.

4th. For the carriages herein contracted for, which shall be delivered, inspected, and accepted as aforesaid, there shall be paid by the United States to the said parties of the first part, on bills in duplicate, made in approved form, and duly authorized by the proper officers of the Ordnance Department, the price aforementioned in the funds furnished for the purpose by the United States.

5th. If any default shall be made by the parties of the first part in delivering all or any of the carriages mentioned in this contract, of the quality and at the times and places herein specified, then, in that case, the said party of the second part may supply the deficiency by purchase in open market or otherwise (the articles so procured to be of the kind herein specified as near as practicable), and the said parties of the first part shall be charged with the expense resulting from such failure. Nothing contained in this stipulation shall be construed to prevent the Chief of Ordnance, at his option, upon the happening of any such default, from declaring this contract to be thereafter null and void, without affecting the right of the United States to recover for defaults which may have occurred; but in case of overwhelming and unforeseen accident by fire or otherwise, the circumstances shall be taken into equitable consideration by the United States before claiming forfeiture for nondelivery at the time specified.

9

6th. Neither this contract nor any interest therein shall be transferred by the said parties of the first part to any other party; and any such transfer shall cause the annulment of the contract so far as the United States is concerned. All rights of action, however, to recover for any breach of this contract by the said parties of the first part are reserved to the United States.

7th. No Member of or Delegate to Congress, nor any person belonging to or employed in the military service of the United States, is or shall be admitted to any share or part of this contract, or to any benefit which may arise therefrom.

THE BETHLEHEM IRON COMPANY,
By ROBT. P. LINDERMAN, *President.*
D. W. FLAGLER,
Brig. General, Chief of Ordnance.

Witness:
Attest:
ABRAHAM S. SCHROPP,
Secretary.

10 BETHLEHEM IRON COMPANY, CLAIMANT, }
v. } No. 22628.
THE UNITED STATES, DEFENDANT. }

II. *Motion for the substitution of the Bethlehem Steel Company as claimant.*

Now comes the Bethehem Steel Company and shows the court:

1. On April 4, 1898, the Bethlehem Iron Company, the claimant in the above-entitled cause, entered into a contract with the United States, and thereafter performed the same, as set forth in the petition herein.

2. On or about August 16, 1901, the said Bethlehem Iron Company was dissolved by the voluntary surrender of its franchises, and the said Bethlehem Steel Company forthwith became its successor, acquiring all of its assets and assuming all of its contractual liabilities.

3. On June 6, 1902, there was approved an act of Congress entitled "An act making appropriations for fortifications and other works of defense, for the armament thereof, for the procurement of heavy
11 ordnance for trial and service, and for other purposes," which, among other things provided:

"All contracts of the Bethlehem Iron Company, of South Bethlehem, Pennsylvania, heretofore made between it and the United States, except the contract of November seventh, eighteen hundred and ninety-one, for one hundred eight, ten, and twelve-inch guns, shall be completed by its successor, the Bethlehem Steel Company, or its successor, which has acquired or may acquire all of its assets and has assumed or may assume all of its liabilities under the said contracts; and the said Bethlehem Steel Company, or its lawful successor, upon giving good security in same form and amount, conditioned for the performance by it of the said contracts, shall be substituted therein for the said Bethlehem Iron Company and be entitled to exercise all rights thereunder which the said Bethlehem Iron Company had or would have had if it had continued in existence."

4. On February 10, 1903, the said Bethlehem Steel Company, the successor of the said Bethleham Iron Company, in compliance with the requirement prescribed by the said act, as a condition precedent to its substitution for the said Bethlehem Iron Company in contracts between the latter and the United States, filed with the Chief of Ordnance, a declaration whereby it asked that such substitution be made, and gave good security to the United States, conditioned for the faithful per-
12 formance by it of the said contract of April 4, 1898, in the same form and amount as the security originally given for such performance by the said Bethlehem Iron Company.

5. By reason of these facts the said Bethlehem Steel Company became and now is entitled to be substituted for the said Bethlehem Iron Company in the same contract, and to have and exercise all rights thereunder, which the said Bethlehem Iron Company had or might have had if it had continued in existence.

Wherefore the petitioner prays the court to substitute it for the said Bethlehem Iron Company as the claimant in this cause, with authority to prosecute the same to judgment.

McCAMMON & HAYDEN,
Attorneys for Claimant.

Filed March 24, 1903.

APRIL 27, 1903.

THE BETHLEHEM IRON COMPANY,
v.
THE UNITED STATES. } No. 22628.

The motion that the Bethlehem Steel Company be substituted as claimant herein was allowed.

BY THE COURT.

13 III. *Traverse.*

(Filed November 15, 1905.)

In the Court of Claims of the United States. Term A. D. 1905–1906.

BETHLEHEM STEEL CO.,
v.
THE UNITED STATES. } No. 22628.

And now comes the Attorney-General, on behalf of the United States, and answering the petition of the claimant herein, denies each and every allegation therein contained; and asks judgment that the petition be dismissed.

L. A. PRADT,
Assistant Attorney-General.

14 IV. *Argument and submission of case.*

This cause was argued by Mr. Hayden for the claimant and by Mr. Collins for the defendants on the 15th and 16th days of November, 1905, and submitted.

15 V. *Findings of fact and conclusion of law, and opinion of the court.*

(Filed December 4, 1905.)

BETHLEHEM STEEL COMPANY,
v.
THE UNITED STATES.

This case having been heard by the Court of Claims, the court, upon the evidence, makes the following

FINDINGS OF FACT.

I.

The claimant, the Bethlehem Steel Company, is a corporation incorporated and existing under the laws of the State of Pennsylvania. On April 27, 1903, the claimant, being the successor of the said Bethlehem Iron Company, and having complied with the conditions prescribed by the act of Congress entitled "An act making appropriations for fortifications and other works of defense, for the armament thereof, for the procurement of heavy ordnance for trial and service, and for other purposes,"

approved June 6, 1902 (32 Stat. L., 305, 308), was, pursuant to the provisions of the said act, substituted for the said Bethlehem Iron Company as claimant in this cause.

II.

On or about March 8, 1898, the defendants, through the War Department, advertised as required by law for sealed proposals for the construction of six disappearing gun carriages for 12-inch breech-loading rifles, model of 1896, the specifications accompanying this advertisement setting forth the character and extent of the work to be done.

III.

In response to said advertisement the claimant company, among others, submitted sealed proposals as follows:

"PROPOSAL NO. 1.—We propose to furnish five or more 12-inch disappearing gun carriages, model 1896, for the sum of $31,000.00 each, and to deliver the first carriage within six months of date of contract, to be followed by two carriages every three months thereafter; or

16 "PROPOSAL NO. 2.—We propose to furnish five or more 12-inch disappearing gun carriages, model 1896, for the sum of $33,000.00 each, and to deliver the first carriage within five months from date of contract, to be followed at the rate of one carriage every month thereafter; or

"PROPOSAL NO. 3.—We propose to furnish five or more 12-inch disappearing gun carriages, model 1896, for the sum of $35,000.00 each, delivering the first carriage within four months and the second within five months of date of contract; the remaining carriages to follow at the rate of three carriages every two months thereafter; or

"PROPOSAL NO. 4.—We propose to furnish five or more 12-inch disappearing gun carriages, model 1896, for the sum of $36,000.00 each, delivering the first carriage in four months, the second in five months, and the remaining carriages to follow at the rate of two carriages every month thereafter."

The foregoing alternative proposals were made in consequence of a letter written the claimant company by the Chief of Ordnance, dated March 11, 1898, which letter is as follows:

"OFFICE OF THE CHIEF OF ORDNANCE,
"UNITED STATES ARMY,
"*Washington, March 11, 1898.*

"GENTLEMEN: It is suggested that in making bids for carriages you estimate, first, on the price of carriages under the supposition that the works will run for twenty-four hours; second, that later, if it be found advantageous, the ordinary working hours may be observed. It is considered best that bids should be made for carriages by numbers, as, for instance, so much for five 8-inch carriages, for six, eight, etc. Therefore it is considered judicious that bids should be made for rapid delivery of a certain number of carriages or for less rapid delivery of the same. It should be understood, however, that time will be conconsidered very important.

"Respectfully,

D. W. FLAGLER,
"*Brig. Gen., Chief of Ordnance.*"

IV.

The defendants, through the War Department, accepted proposal No. 4 of the claimant company.

V.

In drawing up the contract between the United States and the claimant company a slight modification of proposal No. 4 was decided upon, which was as follows:

Whereas in proposal No. 4 claimant company was to deliver five or more carriages, the first in four months, the second in five months, and the remaining ones to follow at the rate of two carriages per month. In drawing up the contract this was changed so as to provide for the delivery of one carriage in four months (as proposed) and five carriages in six months from the date of contract, thus reducing the time of the delivery of all the carriages from seven to six months, this reduction of the total delivery being offset by the increased latitude given claimant company as to intermediate deliveries.

17 VI.

On April 4, 1898, the Ordnance Department transmitted a form of contract of even date to the claimant company for execution and return by letter, as follows:

"OFFICE OF THE CHIEF OF ORDNANCE,
"UNITED STATES ARMY,
"*Washington, April 4, 1898.*

"THE BETHLEHEM IRON CO., *South Bethlehem, Pa.*

"GENTLEMEN: I am instructed by the Chief of Ordnance to transmit herewith contract, in quintuplicate, dated the 4th instant, for six 12-inch disappearing gun carriages, model 1896, for execution and return to this Office.

"Respectfully,
R. BIRNIE,
"*Capt., Ord. Dept., U. S. A.*"

To this letter the claimant company made reply on April 5, 1898:

"THE BETHLEHEM IRON COMPANY,
"*South Bethlehem, Pa., April 5, 1898.*

"CHIEF OF ORDNANCE, U. S. A.,
"*War Department, Washington, D. C.*

"SIR: We have examined the contract forms, covering six disappearing gun carriages, model 1896, for 12-inch B. L. rifles, for which we submitted proposals under date of the 19th ultimo, and write to call your attention to the third clause, relating to our liability on account of any patent rights granted by the United States, is not struck out, as has been done in the case of previous contracts for carriages.

"We also note that the penaltymentioned in the contract for each day of delay in delivery of each carriage is $75 instead of $10, as is stipulated in the instructions to bidders and specifications.

"We made our bid under the understanding that the penalty for non-delivery was to be $10 per day, and we respectfully request that the contract forms may be modified in accordance with this understanding.

"We return herewith the contract forms, and remain,

"Respectfully,

"THE BETHLEHEM IRON COMPANY,
"R. W. DAVENPORT,
"*Second Vice-President.*"

Whereupon the claimant company was informed by the Chief of Ordnance, by letter of April 9, 1898, as follows:

"OFFICE OF THE CHIEF OF ORDNANCE,
"UNITED STATES ARMY,
"*Washington, April 9, 1898.*

"THE BETHLEHEM IRON COMPANY,
"*South Bethlehem, Pa.*

"GENTLEMEN: In reply to your letter of April 5, 1898, returning contract forms, I have the honor to inform you that your request
18 in regard to your liability on account of patent rights has been complied with and the third paragraph has been stricken out.

"In regard to the penalty for delay in delivery being $75 per day instead of $10 per day, I have to state that the former amount is the average difference in time of delivery between your price recently bid for slow delivery of these carriages and the price under the accepted bid. The Department feels it to be just that this average difference should be the prescribed penalty; but, if you should prefer, instead of taking the average difference, that the exact difference per day for each particular carriage should be prescribed, the forms will be altered accordingly.

"The contracts are returned, hoping this explanation will be satisfactory.

"Respectfully,

D. W. FLAGLER,
"*Brigadier-General, Chief of Ordnance.*"

Thereafter it was found that an error had been made in the above computation, in that the $75 per day deduction provided for should have been $35 instead, and the claimant company was duly informed of this by letter dated April 16, 1898, which is as follows:

"OFFICE OF THE CHIEF OF ORDNANCE,
"UNITED STATES ARMY,
"*Washington, April 16, 1898.*

"THE BETHLEHEM IRON COMPANY,
"*South Bethlehem, Pa.*

"(Through the Inspector of Ordnance, U. S. A.)

"GENTLEMEN: Referring to my letter, No. 21985, of the 9th instant, I would invite your attention to the fact that an error was made in the computation in the amount of the deduction in price per day of delay in delivery of 12-inch disappearing carriages, L. F., model of 1896, recently

ordered from you, and to inform you that the contract should read that such deduction in price should be $35 per day of delay in delivery, in accordance with principle stated in my above-mentioned letter.

"Respectfully,

"D. W. FLAGLER,
"*Brigadier-General, Chief of Ordnance.*"

Before signing the contract in its present form the claimant company, by communication of April 20, 1898, requested that the same should be modified in some respects, which request is contained in the following communication:

"THE BETHLEHEM IRON COMPANY,
"*South Bethlehem, Pa., April 20, 1898.*

"CHIEF OF ORDNANCE, U. S. A.,
"*War Department, Washington, D. C.*

"SIR: Referring to the forms of contract for six 12-inch disappearing gun carriages, carrying the date of April 4, 1898, which have recently been received, but not yet executed, and to the conversation which the writer had with you on Thursday last, we beg to state that on further carefully considering the possibilities of the case we do not believe that we will be able to deliver the six carriages within six months, as
19 called for by the proposed contract. We will, however, undertake to complete, in accordance with our bid, the delivery of the first carriage in four months, the second within five months, and the remaining four at the rate of two per month, thus making the total time of delivery of the six carriages seven instead of six months, it being understood that no penalty will be charged against us for the one month of delay which will thus accrue on the fifth and sixth carriages.

"By agreeing to this proposition the Department will be the gainer, in that the second carriage will be due at the end of the fifth month, while, as the contract now reads, it would *be* not be due until the end of the sixth month.

"With the above understanding confirmed, we will execute the contract as it now stands, except as to the amount of penalty for delay in delivery, which, in accordance with your letter of April 16, will be $35 instead of $75 per day.

"We return the contract forms in order that the change as regards penalty may be made.

"We remain, respectfully,

"THE BETHLEHEM IRON COMPANY,
"R. W. DAVENPORT,
"*Second Vice-President.*"

To which letter the following reply was made:

"OFFICE OF THE CHIEF OF ORDNANCE,
"UNITED STATES ARMY,
"*Washington, April 25, 1898.*

"THE BETHLEHEM IRON COMPANY,
"*South Bethlehem, Pa.*
"(Through Inspector of Ordnance, U. S. A.)

"GENTLEMEN: In reply to your letter of the 20th instant, I have the honor to inform you that the schedule of deliveries of 12-inch disappearing carriages contained therein will, in view of the earlier resulting delivery of the second carriage, be accepted in lieu of the schedule in the contract, without enforcement of penalties which would result from the change of schedule.

"The amount of the penalty for delay in delivery is changed from $75 to $35 per day in accordance with my letter of the 16th instant, and the contract forms are returned herewith for execution.

"Respectfully,

"D. W. FLAGLER,
"*Brigadier-General, Chief of Ordnance.*"

The above correction was therefore made in the said contract, and the same was duly signed and executed by the claimant company and immediately transmitted to the War Department. A copy of said contract is annexed to and made part of the petition.

VII.

Thereupon the Bethlehem Iron Company proceeded to manufacture the said gun carriages, and ultimately delivered them to the United States, and they were accepted by the latter. The following table gives, first, the date fixed by the said contract for the delivery of each one of said carriages; second, the date of its delivery, and, third, the extent of the delay in its delivery.

Number of carriage.	Date for delivery fixed by contract.	Date of delivery (actual).	Extent of delay.
16	August 4, 1898	January 28, 1899	177 days.
17	September 4, 1898	March 6, 1899	183 "
18	October 4, 1898	April 13, 1899	191 "
19	October 4, 1898	March 18, 1899	165 "
20	November 4, 1898	April 29, 1899	176 "
21	November 4, 1898	May 27, 1899	204 "
	Total delay		1,096 days.

Of the above days of delay, which amounted in the aggregate to 1,096 days, the United States, through the Chief of its Bureau of Ordnance, decided that the Bethlehem Iron Company was responsible for delays to the extent of 100 days upon each of the six disappearing gun carriages, or 600 days in all, but did not charge said company with the balance of

said days, or 496 days in all; which, at the stipulated sum of deduction at $35 per day for each day of delay in the delivery of each gun carriage, amounted to the sum of $21,000, which sum was deducted from the payments made the claimant company, and the balance, or the sum of $195,000, was paid over to the claimant company, who receipted for said payment under the following protest:

"BETHLEHEM IRON COMPANY,
"*South Bethlehem, Pa., June 28, 1901.*

"SIR: Under our contract of April 4, 1898, there remains according to our construction of its clauses, to be paid us the sum of $54,000. A voucher is presented to us by the Ordnance Department, dated September 7, 1899, for final payments on six 12-inch disappearing gun carriages (being Nos. 16 to 21, both inclusive), amounting to $54,000, less $21,000 deducted for delays in delivery, making the net amount to be paid $33,000.

"As we do not think all these penalties should have been collected by the Ordnance Department, but think that we are entitled to the sum of $54,000 without deductions, we respectfully notify the Department that we intend to make application to the proper Executive Department or to Congress, and shall pursue any remedy in this matter warranted by law, so that our action in receiving the sum will not be considered to operate as a waiver of our rights hereafter to demand the remainder of the amount claimed by us as due under our contract of April 4, 1898.

"Respectfully,

"THE BETHLEHEM IRON COMPANY,
"ROBT. T. LINDERMAN, *President.*

"To the CHIEF OF ORDNANCE,
"*United States Army, Washington, D. C.*"

21 VIII.

The court finds as the ultimate fact that the defendants' officers hindered and delayed the claimant in the performance of the work by changes in the plans of construction, as alleged in the petition, and in various other ways; but the court also finds that the claimant contributed to the delay in the completion of the work by being insufficiently equipped and prepared to complete it within the time prescribed in the contract and by taking other work to the exclusion of that referred to in these findings; and the court further finds that the transactions in the process of manufacture were so involved and intermerged that it is impossible, on the evidence produced, for the court to ascertain and determine whether the the defendants should be charged with a greater proportion of the delays set forth in the foregoing table in Finding VII than those assumed by the defendants' officers, to wit, 496 days out of the total amount of delays, to wit, 1,096 days.

It does not appear that the defendants were ready to use the gun carriages hereinbefore described at the time when they were finally delivered by the claimant; nor does it appear that they could have used them on their fortifications if they had been delivered at an earlier day. Nor

does it appear that the defendants suffered any injury or damage whatever by the delay of the claimant in delivering the said gun carriages hereinbefore set forth.

CONCLUSION OF LAW.

Upon the foregoing findings of fact the court decides, as a conclusion of law, that the claimant recover judgment in the sum of twenty-one thousand dollars ($21,000).

OPINION.

Per CURIAM:

In view of the fact that the gun carriages to be manufactured by the claimant were not articles from which the defendants could obtain on their completion a valuable use or profit, such as might be derived from a house or a vessel; and in view of the fact that the deduction of $35 a day on each gun carriage during the period of delay would amount in a year to $12,775, or 35.48 per cent on the cost of each gun carriage; and in view of the fact that the parties in their correspondence and contract designated the above per diem as a penalty, the court does not feel justified in holding that it was mutually intended to be liquidated damages.

Under the decision in The Phoenix Iron Company v. United States (39 C. Cls. R., 526) and the decisions therein cited, the judgment of the court is that the claimant recover $21,000.

BY THE COURT.

22 VI. *Judgment of the court.*

THE BETHLEHEM STEEL COMPANY
v.
THE UNITED STATES. } No. 22628.

At a Court of Claims held in the city of Washington on the 4th day of December, 1905, judgment in the above-entitled case was ordered to be entered as follows:

The court on due consideration of the premises find for the claimant and do order, adjudge, and decree that the claimant, The Bethlehem Steel Company, do have and recover of and from the United States the sum of twenty-one thousand dollars ($21,000).

BY THE COURT.

23 VII. *Application for and allowance of appeal.*

In the Court of Claims of the United States.

(Term 1905–1906.)

THE BETHLEHEM STEEL COMPANY
v.
THE UNITED STATES. } No. 22628.

From the judgment rendered in the above-entitled cause on the 4th day of December, 1905, in favor of claimant, the defendants, by the

Attorney-General, on the 11th day of January, 1906, make application for, and give notice of an appeal to the Supreme Court of the United States.

LOUIS A. PRADT,
Assistant Attorney-General.

Filed January 11, 1906.

JANUARY 15, 1906.

On motion of Assistant Attorney-General Pradt the application for appeal was allowed as prayed for.

BY THE COURT.

24 In the Court of Claims.

THE BETHLEHEM STEEL COMPANY
v.
THE UNITED STATES. } No. 22628.

I, John Randolph, assistant clerk Court of Claims, hereby certify that the foregoing are true transcripts of the pleadings in the above-entitled case, of the findings of fact and conclusion of law filed by the court, of the opinion of the court, of the judgment of the court, of the application for and allowance of appeal to the Supreme Court of the United States.

In testimony whereof I have hereunto set my hand and affixed the seal of said Court of Claims, this 19th day of January, A. D. 1906.

[SEAL.]

JOHN RANDOLPH,
Asst. Clerk Court of Claims.

(Indorsement on cover:) File No. 20060. Court of Claims. Term No. 558. The United States, appellant, v. The Bethlehem Steel Company. Filed January 22d, 1906. File No. 20060.

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Office Supreme Court, U. S.
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JAMES H. McKENNEY,
CLERK

No. 188.

IN THE SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1906.

THE UNITED STATES, APPELLANT,

v.

THE BETHLEHEM STEEL COMPANY, APPELLEE.

APPEAL FROM THE COURT OF CLAIMS.

Brief on behalf of the United States.

CHARLES J. BONAPARTE,
Attorney-General.

JOSIAH A. VAN ORSDEL,
Assistant Attorney-General.

FRANKLIN W. COLLINS,
Special Attorney.

In the Supreme Court of the United States.

OCTOBER TERM, 1906.

THE UNITED STATES, APPELLANT,
v.
THE BETHLEHEM STEEL COMPANY, Appellee.
No. 188.

APPEAL FROM THE COURT OF CLAIMS.

BRIEF ON BEHALF OF THE UNITED STATES.

STATEMENT.

The Bethlehem Steel Company brought suit in the Court of Claims to recover the sum of $21,000 alleged to be due it from the United States upon a contract for the manufacture of 6 disappearing gun carriages for 12-inch breech-loading rifles, at $36,000 each. The gun carriages were to be constructed according to instructions, specifications, and drawings attached to and forming a part of the contract. By the terms of the contract the first carriage was to be completed and delivered within four months from the date of the contract, April 4, 1898, and the remaining five carriages within seven months from the date of the contract. The Government advertised for the construction of the carriages in question, notifying the bidders under the advertisement "that time will be considered very important." The

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Bethlehem Steel Company, in response to such advertisement, submitted bids or proposals in alternative form, as follows:

It is proposed to build 5 or more carriages at $31,000 each at a rate of delivery which would have required 12 or 13½ months for the completion and delivery of 5 or 6 carriages, respectively, or to build 5 or more carriages at $33,000 each at a rate of delivery which would have required 9 or 10 months for the completion and delivery of 5 or 6 carriages, respectively; or to build 5 or more carriages at $35,000 each at a rate of delivery which would have required 7 or 7⅔ months for the completion and delivery of 5 or 6 carriages, respectively; or to build 5 or more carriages at $36,000 each at a rate of delivery which would have required 6½ or 7 months for the completion and delivery of 5 or 6 carriages, respectively. The Government at that time being involved in international difficulties with Spain and in contemplation of war with that nation, accepted the last-named proposal, calling for the highest degree of celerity, and agreed to pay the highest named price. A contract was drawn accordingly, but in framing it a requirement as to the rate of delivery was incorporated therein which was greater than that submitted by the Bethlehem Steel Company. This requirement was subsequently modified so that the rate of delivery should be considered as the same as that proposed by the company.

In order that the Government should have the benefit of the entire proposition submitted by the Bethle-

hem Steel Company providing for a lower price for a slower rate of delivery, it was provided in the contract that if any carriage contracted for was not delivered by the party of the first part at the time specified in the contract, there should be deducted, in the discretion of the Chief of Ordnance, $35 per day from the contract price to be paid therefor, after allowing the company for delays properly chargeable to the Government. This $35 per day represents the value per day to the United States of these carriages, based upon the highest and lowest prices submitted by the Bethlehem Steel Company.

Referring to the contract price and rate of delivery and comparing them with the lowest price and corresponding slowest rate of delivery in the proposal of the company, it will be seen that there is a total difference in price of $30,000 and a corresponding difference in time of 855 days. These results are shown in the table following:

Carriage Nos.	Delivery under proposal No. 1.	Uniform rate of delivery which would have complied with the terms of the contract.	Difference in days between the deliveries at the two rates, respectively.
	Months.	*Months.*	
First	6	4	60
Second	7½	4⅔	93
Third	9	4⅔	126
Fourth	10½	5⅓	159
Fifth	12	5⅔	192
Sixth	13½	6	225
Total			855

The total number of days difference in delivery for all 6 carriages is 855, and the difference in price for all 6 carriages between that found in proposal No. 1 and that in the contract is $30,000.

The quotient obtained by dividing the $30,000 by 855 represents the value per day to the Bethlehem Steel Company on each of the several carriages, as based on this proposal. This amount is slightly in excess of $35.

This rate of deduction of $35 per day was calculated prior to the extension of the contract time from 6 to 7 months. The contract, therefore, while apparently providing for paying the company the highest price for the highest rate of delivery, nevertheless, by the incorporation of the deduction in price of $35 per day, really included the entire proposal of the company. In ascertaining this deduction and incorporating the same in the contract the Chief of Ordnance had in view the period of time covered by the entire proposal of the Bethlehem Steel Company, and the amount of deduction fixed upon was less than if any other two of the proposals of said company were considered.

The Bethlehem Steel Company proceeded with the construction of the carriages, but consumed about 14 months, instead of 7 months as agreed upon, and was paid by the Government on the basis of its proposal for such protracted period of delivery, together with liberal allowances made by the Government for delays for which the Chief of Ordnance found the contractor was not at fault. The contractor

demanded settlement upon a basis of a 7 months' period of construction, and that being refused brought this suit to recover the balance alleged to be due.

ASSIGNMENT OF ERROR.

The Court of Claims erred in rendering judgment against the appellant and in favor of the appellee upon the findings of fact.

BRIEF OF ARGUMENT.

The appellee entered into an agreement with the Government, by the terms of which it was to receive a stated sum for doing certain work within a stated time, and another and lesser sum if the completion of the work should be delayed. Having itself fixed what the difference in price should be, and having failed to complete the work contracted for within the prescribed time, which would entitle it to receive the highest price, it now seeks to recover the highest price and thereby escape the consequences of its own laches.

The contractor herein was expressly notified by the Government before it made its proposals, "that bids should be made for rapid delivery of a certain number of carriages or for less rapid delivery of the same," and, further, "that time will be considered very important."

It was in obedience to this suggestion that the contractor submitted proposals in alternative form. (Record, p. 8.)

The last proposal, or proposal No. 4, was accepted by the Government. It called for the most rapid delivery, for which the highest price was to be paid per carriage. The contract recognized the essential

features of the proposal, to the end that while the Government was willing to pay the sum of $36,000 per carriage, or the highest price, in the event the appellee should deliver the 6 carriages contracted for within the period of seven months, it also was embodied therein that if the appellee failed to make such deliveries within such time, due to its own fault, there should be a per diem deduction made from the contract price, so that the Government should not be obliged to pay, in any event, a larger sum for the carriages in question than that contained in appellee's proposals, which were based upon time alone.

In other words, the per diem deduction, which is improperly referred to in the contract as "penalty," but which is not in fact a penalty but a fixed rate of deduction for decreased speed in delivery, made by the appellee itself, and agreed to by the Government, was on the theory that the greater the speed in delivery the greater the price for the carriages should be and, conversely, the less the speed in delivery the less the price should be. This suggestion, emanating from the appellee and assented to by the Government, was embodied in the part of the contract which reads as follows:

> It is further stipulated and agreed that if any carriage herein contracted for is not delivered by the party of the first part at the time specified herein there will be deducted, in the discretion of the Chief of Ordnance, thirty-five dollars ($35.00) per day from the price to be paid therefor for each day of delay in the delivery of each carriage, respectively.

It is difficult to understand on what basis of law the United States should be compelled to pay the appellee the highest price bid, as per its proposals, for the most rapid rate of delivery, when, in truth, the deliveries made were practically in accordance with proposal No. 1, wherein the appellee would have received the minimum price for the slowest deliveries. *The appellee represented in its proposals that it was worth $5,000 more per carriage to deliver and complete the 6 carriages in question within 7 months than it was to complete and deliver the same carriages within 14 months. That being true, and that having been practically embodied in the contract, what legal or equitable right has the appellee to recover the sum prayed for?*

The appellee, in the proposals made in compliance with the advertisement and instructions to bidders, fixed and determined the amount of increased compensation which it was to receive in the event of the acceptance of the proposals made by it calling for increased speed or reduced compensation in the event of the acceptance by the Government of proposals made by it for reduced speed. This feature of the proposals having become a part of the contract as one of its express stipulations, it is too late to deny its justice or reasonableness, or to urge that it should not be exacted of the appellee for its default. The $35 per day per carriage for delay in delivery was made a part of the contract. If there is any doubt of this fact, it will be removed by referring to the correspondence between the claimant and the Chief of Ordnance, appearing on pages 10 and 11 of the transcript of rec-

ord. It will be found from this correspondence that the $35 per day was fixed and agreed upon between the parties before the signing of the contract and was one of the specific conditions of the contract.

If it is worth $5,000 less per carriage for the appellee to complete and deliver the carriages in 14 months than to do the same work and deliver the same carriages in 7 months, and the appellee so stated in its proposals and so obligated itself in the contract, from the provisions of which it now seeks to escape, the work in question having been done on the abovementioned basis and settlement having been made accordingly, why should the Government be asked or required to pay any more?

TIME WAS OF THE ESSENCE OF THE CONTRACT.

While this statement was not made in exact terms, nevertheless it is impossible to read the advertisements, the proposals, the correspondence, the stipulations of the contract relating to time, and the method adopted of arriving at the per diem deductions to be made without coming to the conclusion that it was one of the avowed objects of the contracting parties. It has been repeatedly held, in fact has become a legal maxim in cases of this character, as announced by Mr. Justice Story in the case of *Taylor* v. *Longworth* (14 Pet., 172–4), that:

> There is no doubt that time may be of the essence of a contract for the sale of property. It may be made so by the express stipulation of the parties or it may arise by implication from the very nature of the property or the avowed objects of the seller or the pur-

> chaser. And even when time is not thus either expressly or impliedly of the essence of the contract, if the party seeking specific performance has been guilty of gross laches or has been unreasonably negligent in performing the contract on his part, or if there has in the intermediate period been a material change of circumstances affecting the rights, interests, or obligations of the parties; in all such cases courts of equity will refuse to decree any specific performance, upon the plain ground that it would be inequitable and unjust.

This doctrine has been affirmed in a number of cases. (*Jones* v. *United States*, 96 U. S., 24.)

In *Secombe* v. *Steel* (20 How., 94–104), it is said:

> Time may be made of the essence of the contract by express stipulation or it may become essential from considerations arising from the nature of the property or the character of the interest bargained. And the principles of the courts of equity do not depend upon considerations collateral to the contract merely nor upon the conduct of the parties subsequently showing that time was not of the essence of the contract in the particular case, but it must affirmatively appear that the parties regarded time or place as an essential element in their agreement, or a court of equity will not so regard it. (*Brown* v. *Guaranty Trust Co.*, 128 U. S., 403–414.)

Here time was an all-important consideration—was so represented in the advertisements and the instructions to bidders, was so treated by the appellee in its proposals and in the contract itself.

THE PER DIEM DEDUCTIONS WERE NOT PENALTIES, THOUGH REFERRED TO AS SUCH IN THE CONTRACT.

Much stress was laid by opposing counsel, and obviously by the court below in its decision, upon the use of the word "penalty" in the contract itself, as though if that expression of evil omen should creep into a contract, whatever the terms of the contract or the manifest meaning of its provisions might be, the contractor might thereby escape the performance of his just obligations.

It is insisted, however, that neither the Government nor the court in its interpretation of the contract is to be concluded by the use of the technical term "penalty," for all text writers and all courts hold, as did the Court of Claims in the leading case of *Davis and Davidson* v. *United States* (17 C. Cls. R., p. 201), as stated in the syllabus, that—

> In determining whether the amount claimed in a contract shall be taken as penalty or liquidated damages courts are influenced largely by the reasonableness of the transaction and are not restrained by the form of the agreement nor by the terms used by the parties, nor even by their manifest intent, which will be carried out so far only as it is right and reasonable.

And the court in that case, speaking through Mr. Chief Justice Nott, after using the above-quoted language, goes on to say:

> Where the contract has expressly designated the amount named as liquidated damages courts have held that it was penalty, and, con-

versely, where the contract has called it a penalty it has been held to be liquidated damages.

The above case has been cited with approval in the case of *Halladay et al.* v. *U. S.* (35 C. Cls. R., 453); also in the case of *Edgar Thompson Works* v. *U. S.* (34 C. Cls. R., 218).

As stated before, the cases are numerous where the courts have held the sum stipulated to be paid on breach of the agreement to be, from the nature of the case, a penalty, notwithstanding the strongest language showing the intention of the parties to be that it should be paid in full as liquidated damages.

Boys v. *Ancell*, 5 Bing., N. C., 391;
Davies v. *Penton*, 6 B. & C., 216;
Horner v. *Flintoff*, 9 M. & W., 678;
Reindel v. *Shell*, 4 C. B. N. S., 97.

On the other hand, cases are numerous in which the parties have used the term "penalty" which seems on its face to import a forfeiture rather than a valuation of damage, yet the courts have held that the stipulated sum was, from the very nature of the case, to be considered as liquidated damages and recoverable in full.

Sainter v. *Ferguson*, 7 C. B., 716.
Leighton v. *Wales*, 3 M. & W., 545.
Sparrow v. *Paris*, 7 H. & N., 594.

"The use of the term penalty or liquidated damages is not conclusive on the one hand, and provision for liquidated damages may appear from the contract to be a provision for a penalty, and will accordingly be so treated."

"On the other hand, a contract for a 'penalty' may appear from the context to be a contract for 'liquidated damages,' and may be so treated."

Page on Contracts, 1905, section 1172.
Robinson v. *Aid Society*, 68 N. J. L., 723.
Illinois Central Ry. v. *Cabinet Co.*, 104 Tenn., 568.
Clark v. *Barnard*, 108 U. S., 436.
Jacqua v. *Heddington*, 114 Ind., 309.

"If the damages accruing from the breach of contract are of an uncertain nature, and the parties have chosen to assess them beforehand by agreement among themselves, and the amount agreed upon is no more than may be a reasonable measure of damages, it is not a penalty, although it is denominated penal sum." (Addison on Contracts, 10th ed., 1903, p. 264.)

In determining whether the sum named is a penalty or liquidated damages, the courts will not be guided by the name given to it by the parties. In other words, if it is liquidated damages they will enforce it, though it was erroneously termed penalty. (*Ward* v. *Building Co.*, 125 N. Y., 230; *Bagley* v. *Peddie*, 16 N. Y., 469.)

How the Court of Claims arrived at its conclusion of law in this case in view of its decision in the case of the *Phœnix Iron Company* v. *United States* (39 C. Cls. R., 526) and the decisions therein cited is not apparent. The decision of the court below in the case cited and the reasoning of the court on which it is based are clearly in harmony with the contention of the Government herein.

In the case cited, as in the case at bar, time was an essential feature of the contract. There, as here, the contract provided that a per diem deduction should be made for each day of delay in the completion of the contract due to the fault of the contractor. In that case the deduction was referred to as "liquidated damages," while in this case it is misnamed "penalities," but in other respects the cases were identical. There the court in its decision adopted the view of the Government, here the view of the claimant. Perhaps no better synopsis of the leading authorities on this question can be found than that presented by Judge Weldon. In delivering the opinion of the Court of Claims he said:

> While courts are disposed to construe contracts of the kind in controversy as open to the question of real or actual damages, they do not hesitate to enforce the agreement when from the terms of the contract and the subject-matter of the litigation it is shown that the parties have agreed to the amount as a settlement of the real or actual damages.
>
> If the intention, however, is clear to liquidate damages and the amount is either not greatly above or below the sum which would otherwise be recoverable, or, if above, were fixed specifically to cover contemplated consequential losses not provable under legal rules, and is not an unreasonable provision therefor, the sum fixed may be sustained as liquidated damages. (Sutherland on Damages, vol. 1, p. 504.)
>
> Many cases, some of which will be hereafter

noted, have been decided in this court involving the question as to whether the stipulation of the parties on the subject of damages was to be treated as a mere penalty or liquidated damages, precluding an inquiry into the question as to how much the party had suffered by the delinquency or default of the other party. One of the last and leading cases on the subject of the stipulation of parties of the sum to be paid for nonperformance of a covenant is the case of the *Sun Printing and Publishing Association* v. *Moore*. (183 U. S., 643.) As stated in the syllabus, it is said:

The naming of a stipulated sum to be paid for the nonperformance of a covenant is conclusive upon the parties in the absence of fraud or mutual mistake.

Parties may, in a case where the damages are of an uncertain nature, estimate and agree upon the measure of damages which may be sustained from a breach of the agreement.

The law does not limit an owner of property from affixing his own estimate of its value upon a sale thereof.

It is true that in the above case it was not a question of penalty or liquidated damages, but the transaction is akin to a stipulation as to the damages in case of the nonperformance of an agreement within a specified time.

Where the parties have agreed upon an amount of damages by way of adjustment and have so expressed it, the amount fixed will be treated as damages and not as penalty. (*Gammon* v. *Howe*, 14 Me., 250.)

In the case of *Dakin* v. *Williams* (17 Wend., 447), Chief Justice Nelson said:

"From a critical examination of all these cases, and others that might be referred to, it will be found that the business of the court, in construing this clause of the agreement as in respect to every other part thereof, is to inquire after the meaning and intent of the parties; and when that is clearly ascertained from the terms and language used it must be carried into effect. A court of law possesses no dispensing powers; it can not inquire whether the parties have acted wisely or harshly in respect to any stipulation they may have thought proper to introduce into their agreements. If they are competent to contract within the prudential rules the law has fixed as to the parties, and there has been no fraud, circumvention, or illegality in the case, the court is bound to enforce the agreement."

In the case of *Hall* v. *Crowley* (87 Mass., 314) the court in substance said:

"The sum named is for doing one certain and specific job of work within a prescribed time, and not for the omission to comply with diverse and separate stipulations; that the loss or injury which would accrue to the owner for the noncompletion of the house according to the terms of the contract would be difficult to estimate and prove. All these circumstances indicate the intent of the parties to insert a fixed measure of damages and not penalty."

Where the intent of the parties is clear, the

use of the word "forfeit" in the clause providing for damages is not regarded as of much weight.

In the case of *Worruff* v. *McClanahan* (5 Storbh. (5 Carr), 115) it was held that forfeiture took the form of liquidated or stated damages where it was provided that the builder should forfeit $100 per month from a certain time until the actual completion of the house. The court said: "While we fear the plaintiff has made an agreement which will work harshly upon him, it is his contract."

In a case where the party in consideration with another conveyed to him 14 city lots for a consideration of $21,000, covenanted that he would by a certain day erect two brick houses, or in default thereof pay to the grantor on demand the sum of $4,000, the court held that the sum was liquidated damages. (*Pearson* v. *Williams*, 24 Wend. (N. Y.), 244; 26 Wend. (N. Y.), 630.)

In the case of *Halliday et al.* v. *United States* (33 C. Cls. R., 468) it was held that after the extension of time for the completion of the contract the parties stipulated that in case of a failure to complete within the extended time the sum of $50 per day should be paid for such failure, that the sum assumed the form of liquidated damages equivalent to "the measure of injury or compensation" as used in the case of *Van Buren* v. *Diggs*. (11 How., 361.)

The attention of the court * * * is called to the case of *Davis* v. *United States* (17 C. Cls. R., 201), in which it is held, in sub-

stance, that the court is influenced largely by the reasonableness of the transaction in the determination of the question as to whether the stipulated sum is to be construed as penalty or liquidated damages.

In the case of *Edgar Thompson Works* v. *The United States* (34 C. Cls R., 205) it is said:

"Each case must be governed by its peculiar facts, and no general rule can be prescribed in doubtful cases to determine the question as to whether the provision is to be regarded as a penalty or to be enforced as a compensation for the injury. The contract of the parties will be enforced as to liquidated damages if conscionable, but in doubtful cases will be construed as a penalty, and thereby enforce against the delinquent party a responsibility only to the extent of allowing the injured party a just compensation for the injury sustained."

In the same opinion the court says:

The subject-matter of the contract belongs to the class which is not easily susceptible of proof of actual damages, and therefore it was most expedient, from the peculiar character of the agreement, that the parties should fix the amount of damages.

Is not such comment equally applicable to this case, where the actual damages are unquestionably impossible of ascertainment? According to the contention of the appellee, the clause in the contract providing for a per diem deduction in case of its failure to deliver the carriages within the contract period is

meaningless, although it was carefully calculated, considered, and presented in the alternative proposals submitted in response to the advertisements of the United States, and the amount of said deductions for delay attributable to the fault of the appellee was fixed by the appellee itself and subsequently embodied in the contract.

Such contention is not in harmony with sound legal principles or good common sense, which is the fountain head of both law and equity.

The case of *Van Buren* v. *Diggs* (11 How., 461–467) differs materially from the case at bar in that whereas in the case cited an arbitrary amount was declared to be forfeited by Diggs to Van Buren in case of the builder's failure to build the house contracted for by a specified time, in this case the damages agreed upon for the nondelivery of the carriages, due to the fault of the appellee, were carefully calculated, measured, and determined upon by the appellee, were incorporated in its proposals, and formed the basis for the stipulation in the contract relating to damages in the case of the appellee's default. In the Van Buren and Diggs case (*supra*) a case of this character was expressly excepted, for the court therein says (p. 477):

> Unless, therefore, it shall have been expressly adopted and declared by the parties to be a measure of injury or compensation, it is never taken as such by courts of justice.

In the case at bar, the appellee having fixed the price at which it was worth to build the carriages within time limits, and this having been accepted by

the Government as a basis of damage in case of the appellee's failure to build the carriages according to said time schedule, brings this case within the exception above noted, and hence the case cited supports the contention of the appellant rather than that of the appellee.

As was said by Mr. Justice Wright in *Clement* v. *Cash* (25 N. Y., 253), a case cited with approval by this court in the case of the *Sun Printing and Publishing Association* v. *Moore* (183 U. S., 642):

> A court of law has no right to erroneously construe the intention of the parties, when clearly expressed, in the endeavor to make better contracts for them than they have made for themselves. In these, as in all other cases, the courts are bound to ascertain and carry into effect the true intent of the parties. I am not disposed to deny that a case may arise in which it is doubtful, from the language employed in the instrument, whether the parties meant to agree upon the measure of compensation to the injured party in case of a breach. In such case there would be room for construction, but certainly none where the meaning of the parties was evident and unmistakable.

And the court, after exhaustively reviewing the authorities, including its former decisions and the decisions of other courts with respect to the doctrine of penalties and liquidated damages, goes on to say:

> From a critical examination of all these cases and others that might be referred to, it will be found that the business of the court, in con-

strueing this clause of the agreement, as in respect to every other part thereof, is to inquire after the meaning and intent of the parties; and when that is clearly ascertained from the terms and language used it must be carried into effect. A court of law possesses no dispensing powers; it can not inquire whether the parties have acted wisely or rashly in respect to any stipulation they may have thought proper to introduce into their agreements. If they are competent to contract within the prudential rules the law has fixed as to parties, and there has been no fraud, circumvention, or illegality in the case, the court is bound to enforce the agreement.

Men may enter into improvident contracts where the advantage is knowingly and strikingly against them; they may also expend their property upon idle or worthless objects, or give it away if they please without an equivalent, in spite of the powers or interference of the court; and it is difficult to see why they may not fix for themselves by agreement in advance a measure of compensation, however extravagant it may be, for a violation of their covenant (they surely may after it has accrued) without the intervention of a court or jury. Can it be an exception to their power to bind themselves by lawful contract? We suppose not; and, regarding the intent of the parties, it is not to be doubted but that the sum of $3,000 was fixed upon by them "mutually and expressly," as they say, "as the measure of damages for the violation of the covenant, or any of its terms or conditions." If it be said that the measure is

> a hard one, it may be replied that the defendant should not have stipulated for it, or, having been thus indiscreet, they should have sought the only exemption which was still within their power, namely, the faithful fulfillment of their agreement.

Applying the reasoning of the court to the case at bar, why should this court be asked to make a better contract for the parties herein than they have made for themselves? Surely both of these parties were "competent to contract within the prudential rules the law has fixed as to parties, and there has been no fraud, circumvention, or illegality in the case," and, therefore, "the court is bound to enforce the agreement."

In fact, applying the language quoted from the learned authority to the case at bar, and it applies as if it were uttered in this case and for this case, the conclusion of the court in both cases should be the same, to the effect that "if it be said that the measure is a hard one, it may be replied that the defendants should not have stipulated for it, or having been thus indiscreet, they should have sought the only exemption, which was still within their power, namely, the faithful fulfillment of their agreement."

ACTUAL DAMAGES IMPOSSIBLE OF ASCERTAINMENT.

It would be difficult to imagine a case wherein the actual damages, although clearly existing, would be more thoroughly beyond the pale of ascertainment by positive proofs. Here is a machine which is

intended for use in connection with war operations, the value of its use in case of war or the value of its possession in time of peace would be entirely an unknown quantity, and hence the damages sustained by reason of the nondelivery of the same when contracted for would be entirely an unknown quantity. It has become almost axiomatic, however, that "the best insurance policy for peace is adequate preparedness for war," and although it is shown that the war between the United States and Spain ceased prior to the contract time for delivery of the carriages in question, and had ceased for a very long period prior to the actual delivery of said carriages, nevertheless it can not be said that the conclusion of actual hostilities entirely deprived the United States of the necessity of strengthening its coast defenses by the installation of the carriages in question.

Who can measure the actual damages in case of the nondelivery of such a piece of mechanism, however costly it may be or however important its use, either in war or in peace? This utter impossibility suggests the necessity for a clause in the contract providing for liquidated or compensatory damages, which, notwithstanding the unfortunate phrasing of the War Department with respect thereto, was clearly intended to be such, and as such has been shown to be reasonable and conscionable. In determining the necessity for such a provision in the contract in question the court must consider the existing conditions at the time the contract was made.

LIQUIDATED DAMAGES DEFINED AND DISTINGUISHED FROM PENALTY.

The law in the case may be summed up as follows:

Where the contract calls for a per diem deduction as the measure of injury, in the event of the occurrence of a specified contingency, and the sum agreed upon does not appear unreasonable upon the face of the contract, and the actual damages are impossible of ascertainment, and no fraud or duress has been practiced to induce either party to enter into the contract, and the sources of information are open alike to both parties, the court should hold that the sum stipulated is the agreed measure of damages.

Examined with care, it will be found that the contract in suit clearly provides for damages of the above description: First, the contract provides for a per diem deduction as the measure of injury, the same being $35 per day to be deducted from the contract price in case of default due to claimant company; second, the deduction is to be made only in the event of the happening of a specified contingency, viz, the failure of the claimant company to complete and deliver the gun carriages within the contract time; third, the sum agreed upon is not unreasonable (it is evaluated by the claimant company itself in its proposals); fourth, the actual damages sustained are impossible of ascertainment; fifth, neither fraud nor duress was practiced to induce the claimant company to enter into the contract; sixth, the claimant company and the defendant had equal sources of and

opportunities for information relative to the matters covered by the contract.

The United States is entitled to the decreased cost of manufacture due to the benefit that the contractor received by taking longer time to perform the work contracted for.

This is shown to be the amount for which the claimant sues. The comment of the Court of Claims in rendering its decision herein, in which it speaks of a total deduction of 35.48 per cent on the cost of each gun carriage, providing the delay should amount to one year, is entirely impertinent to the issues involved, for the deliveries were wholly within the period covered by the various propositions of the claimant company.

IN THE GOVERNMENT'S VIEW OF THE CASE, THE QUESTION PRESENTED IS ONE OF CONTRACT PRICE ALONE.

The Court of Claims erred in declaring that the per diem deductions were "penalties" imposed upon the appellee. The question presented was not and is not one of "penalty," but of contract price, pure and simple. That price was determinable according to time of delivery. That the war which was impending when the contract was let was concluded before the contract time for delivery of the carriages had expired is of no importance. It was the hazard of war and the interests of the case that impelled the Government to call for bids on a basis of celerity, and it was upon that basis that the proposals of the appellee and other bidders were made, and it was

also upon that basis that the contract was drawn and executed. Whether or not the urgent need for said carriages passed away with the conclusion of hostilities is of no importance, nor will it tend to excuse the appellee from the consequences of its own laches nor will it fix a higher price to be paid by the Government upon the work in question.

Obviously, the Government, under the contract and the circumstances, was entitled to the lowest and not the highest price, for the appellee had clearly forfeited all right to demand or receive the maximum price. The Government is entitled to the same protection against fraud and imposition as a private citizen. In this view the position of the appellee is utterly untenable and indefensible. The appellee asks to be paid for diligence which it has not shown, thereby escaping the consequences of its own stipulations, agreements, and acts by raising the specious cry of "penalty."

This court should set the seal of its disapproval upon such a palpable attempt to evade contract obligations.

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No. 188.

In the Supreme Court of the United States.

THE BETHLEHEM STEEL COMPANY
v.
THE UNITED STATES.

REPLY BRIEF ON BEHALF OF THE UNITED STATES.

CHARLES J. BONAPARTE,
Attorney-General.
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In the Supreme Court of the United States.

BETHLEHEM STEEL COMPANY
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REPLY BRIEF ON BEHALF OF THE UNITED STATES.

Argument of appellee, to the effect that contract in suit is free from ambiguity, and parties therefore bound by it, and that "resort can not be had to the transactions which occurred while the contract was *in fieri* for the purpose of showing that they intended something different from the import of the language employed in the instrument," is misleading and fallacious.

If the expression "liquidated damages," were used in the contract instead of "penalties," would the appellee be necessarily concluded thereby? Certainly not.

Neither is the United States concluded by the use of the ill-omened expression "penalties."

The question of penalties, as contradistinguished from liquidated damages, has been a vexed and vexing one to the courts.

They have rarely refused to peer beneath the surface of things to ascertain the "reasonableness

of the transaction," particularly where, from the nature of the agreement, it is clear that any attempt to arrive at the actual damages would be difficult, if not impossible.

Davis & Davidson (17 C. Cls. R., 201).
Gay Mfg. Co. v. *Camp* (65 Fed. Rep., 794).

The authorities first cited in appellee's brief, if in point, are at hopeless variance with those cited in a later portion of the same paper. In its opening paragraphs cases are cited in support of strictness and literalness of interpretation, whereas the subsequent cases cited and relied upon are antagonistic to strict or narrow interpretation. Notably *Davis & Davidson* (17 C. Cls. R., 201); *Edgar Thompson Works* v. *United States* (34 C. Cls. R., 205); *Gay Mfg. Co.* v. *Camp* (65 Fed. Rep., 794).

The case of *Simpson et al.* v. *United States* (172 U. S., 372–379) (cited in appellee's brief at page 10) is not apposite.

That was a case where there was not the slightest trace of ambiguity in the contract. It was an agreement in writing with the United States to construct a dry dock at the Brooklyn Navy-Yard, according to plans and specifications, to be built upon a site that was available. No provision was made in regard to quicksands, should they come upon such in making the foundation. In executing the contract the contractors came upon shifting sands, by reason of which the work was made more difficult and vastly increased. Being unable to complete the contract within the time specified,

the contractors asked for an extension, which was given. On completion of the work settlement was had, and all moneys remaining due under the contract and some due for extra work were paid.

Some three years later claim for compensation for extra labor and materials, rendered necessary by the quicksands, was made, and, when it was refused, action to recover upon these claims was brought in the Court of Claims and there decided adversely to the claimant. Likewise this court, in passing upon the case, held: "That the contract imposed upon the contractors an obligation to construct the dock according to the specifications, within a designated time, for an agreed price, upon a site to be selected by the United States, and contained no statement or agreement, or even intimation, that any warranty, express or implied, in favor of the contractor was entered into by the United States concerning the character of the underlying soil;" and so the judgment of the court below was affirmed.

It is difficult to imagine two cases more diametrically dissimilar than the case cited and the case at bar.

In the Simpson case, the court very properly declined to re-form the contract, or write into the same clauses or conditions not contemplated by the parties thereto.

There being no ambiguity, either patent or latent, there was no call for interpretation.

The remaining cases cited in favor of strict

interpretation are equally inapplicable to the case under consideration.

In cases of this character a different rule obtains, and courts have rarely applied the doctrine of strict interpretation to penalty clauses appearing therein, except where the terms of the contract itself are so clear and unmistakable as to preclude the necessity of interpretation. In fact, it may be said that the doctrine of strict interpretation as applied to penalty clauses of contracts has been "more honored in its breach than in its observance," for the courts have seldom failed not only to scrutinize the agreement itself, but the transactions out of which the same grew, with great care, and not infrequently evidence *aliunde* of the contract has had determining force.

> *Davis & Davidson* v. *United States* (17 C. Cls. R., 201).
>
> See also cases cited, pp. 10–13, Government brief.
>
> *Tayloe* v. *Sandiford* (7 Wheat., 13–17; cited in appellee's brief, p. 14).
>
> *Edgar Thompson Works Co.* (34 C. Cls. R., 205).
>
> *Gay Mfg. Co.* v. *Camp* (65 Fed. Rep., 794–800).
>
> (The last two cases also cited by appellee.)

In the case of *Brawley* v. *United States* (96 U. S., 168–173—cited in appellee's brief, p. 11), in addition to the language quoted by appellee, and almost immediately following it, the court says:

> Previous and contemporaneous transactions may be all very properly taken into consideration to ascertain the subject-matter of a contract and the sense in which the parties may have used particular terms.

If the court hold, as it has frequently held, that the clauses providing for liquidated damages in specific terms are clauses providing for penalties, why not the reverse? This has been done repeatedly. (See cases cited in appellant's brief, pp. 10–12.)

Applying the doctrine announced by the court in the case of *Tayloe* v. *Sandiford* (*supra*) to the case under consideration, the appellant has unquestionably shown that the so-called penalties were considered as liquidated damages by the contracting parties and has furnished "very strong evidence" to show these facts. It is "no slight conjecture," but absolute certainty that the "parties were mistaken in the import of the terms they employed." In confirmation of this assertion, the court's attention is called to the antecedent and contemporaneous transactions, particularly to the advertisement, the proposals, and the correspondence that preceded the execution of the contract, which furnished the basis thereof and which explains the "sense in which the parties used particular terms."

These are a part of the record and are embraced in the findings of fact of the court below.

Some cases are cited by appellee wherein the

Court of Claims, it is believed by the appellant, has fallen into error in declaring per diem deductions to have been penalties. This applies to *Smith & Co.* v. *U. S.* (34 C. Cls. R., 472); also to *Halladay* v. *U. S.* (33 C. Cls. R., 453). It also applies even more emphatically to the case at bar, for here the rate of deduction was not forced upon the contractor, but was, in fact, proffered and tendered by the contractor to the United States in its own proposals.

The case of *Gay Mfg. Co.* v. *Camp* (65 Fed. Rep., 794–800) (cited in appellant's brief, pp. 18, 19) is exactly in point with the Government's contention as applied to the case at bar. In that case it was said:

> If, from the nature of the agreement, it is clear that any attempt to get at the actual damage would be difficult, if not vain, then the court will incline to give the relief which the parties have agreed to; but if, on the other hand, the contract is such that a strict construction of the phraseology would work absurdity or oppression, the use of the term "liquidated damages" will not prevent the court from inquiring into the actual injury sustained, and doing justice between the parties.

It is hard to imagine what aid or comfort the above authority lends to the contention of the contractor, for not only is it an authority against literalness of construction, holding, as it does, that the court will go outside of the phraseology which

oftentimes works "absurdity or oppression," but also "that if attempt to get at the actual damage would be difficult, if not vain, then the courts will incline to give the relief which the parties have agreed to."

This authority fits the case at bar like a death mask, since, from the nature of the agreement under consideration, it is clear that "any attempt to get at the actual damage would be difficult, if not vain. Indeed, it is not too much to say that to "get at the actual damage" which the Government would sustain by reason of the nondelivery of the carriages in question in one year, or ten years, or even a century, is a task beyond finite calculation.

If the court wishes to do equity, it should consider not merely disadvantage to the Government occasioned by the contractor's failure to deliver the carriages within the time contracted for, but the advantage that it would be to the contractor if he were able to prolong the period of construction.

A fundamental error has crept into the decisions of the courts in cases of this character, from the tendency to excuse the contractors for delays in deliveries where the Government is not shown to have suffered actual monetary damage or loss; whereas the court should scan the transaction on both sides, not overlooking the advantage that would accrue to the contractor, according to his own statement or admission, as in this case, that it was worth much less to make the carriages in a

longer period and much more to make them in a shorter period.

If it was worth less, as the court must believe from the terms of the contract in the sense in which the parties used them and intended them, to complete the carriages in a period of fourteen months than in a period of seven months, and if the appellee contracted on the basis of seven months and failed to deliver them within said period, but consumed fourteen months instead, and the contract itself, by a system and scale of per diem deductions based on the appellant's own proposals, fixed the price of delay to correspond to the difference in price of the carriages as embraced in the different proposals, why should not such a contract be enforced? In what respect is the same unconscionable and unfair?

In other words, the contractor is given the option of increased price for increased speed, and, conversely, decreased price for decreased speed, on the basis of his own proposals, to the effect that it costs more and is worth more to complete the work rapidly than slowly.

The contract was advertised, let, and drawn on a celerity basis, and its enforcement should be upon the same basis. The court need only apply the appellee's scale of prices for the carriages in question, based on time, to ascertain that appellee is now asking $21,000 and upward in excess of its own offer to construct and deliver said carriages in the time they were actually finished. Why should

the Government be required to pay more than the contractor represented it was worth to furnish, and offered to furnish, the carriages in question?

Such proposition is utterly destitute of merit. It is absolutely without justification, either in law, in equity, or in morals.

Its mere presentation carries with it irresistible argumentative force.

The case at bar is clearly distinguishable from many of the cases cited in appellee's brief, for time in the contract herein was as much of a moving consideration as the construction of the carriages themselves.

Both parties so regarded it, the Government's advertisement for bids emphasized it, the correspondence reemphasized it, and the contractor so understood it, considered it, and prepared and presented his proposals with this in mind, and the so-called penalty clause in the contract was inserted to cover this particular feature.

The damages were fixed, ascertained, evaluated, and stated by the contractor itself in the first instance in its own proposal, and were afterwards ingrafted and embodied in the contract itself.

This view of the case, and it is the only proper view, eliminates the punitive element entirely. The price having been fixed on an emergency basis, the settlement should be upon the same basis.

This case rests on a time basis—it is a time contract—not merely on Government's side, but on contractors.'

This per diem deduction, miscalled "penalty," was intended not only to measure and liquidate the damage sustained by the Government on the contractor's failure to deliver within the time called for, but the decreased cost of manufacture to the contractor if he nursed the job.

In this view, time was of the essence of the contract, and as controlling as any other element or consideration. Fairly stated, the question at issue is, therefore, price, not penalty.

The use of the expression "penalties" in connection with the phraseology of contracts is a well-nigh incurable departmental disorder—almost epidemic, in fact. It has been used repeatedly where liquidated damages were clearly intended, as herein.

Government is not bound by it, nor are the courts.

Numerous cases so hold.

The contractor avers that the Government has not met with any actual or definable monetary loss, because the foundations which were to receive the carriages were not ready for their reception at the time of the completion of the carriages themselves.

This is misleading and fallacious, for their complete installation was unnecessary. The fact that the Government did not have them, and, hence, could not install them should emergencies require, is sufficient.

We lacked just that much in war equipment and efficiency.

Moreover, even if the Government had been waiting to install them, in that event no actual or appreciable damage due to delay would be provable.

This is a contract which illustrates and demonstrates in a marked degree the necessity for the introduction of a liquidated damage clause to properly protect the interests of the United States.

The court below fell into grievous error in regard to the percentage problem, calling attention as they did in their opinion that it would amount to upward of 35 per cent of the contract price for one year.

Obviously the Court of Claims overlooked the fact that the deliveries were all made within the time limits of the contractor's own proposals, and settlements were made accordingly, after allowing the contractor for delays not properly chargeable to it.

Will the court make a better contract for the contractor than it made for itself?

Will the court say that the contractor did not understand the consequences of its own offer and agreement?

Was any pressure, duress, or undue influence used or anywhere present to induce the contractor to make this agreement?

None whatever.

It is conclusively demonstrated that the parties

were mistaken as to the import of the terms they employed; that is, in the use of the expression "penalties." It has been shown by the most indubitable proofs that this was a time contract, drawn with that end in view, and that the price of the carriages was fixed and determinable on a sliding scale, increasing as deliveries were hastened, decreasing as deliveries were delayed.

Is not such an agreement both conscionable and enforceable?

By what rule of law or principle of justice shall the Government be compelled to pay to the contractor $21,000 in excess of the amount which it represented it was worth, and offered to build and complete said carriages—in the face of the fact that the contractor has already been paid all that was agreed upon for the carriages on the basis of deliveries as made.

Upon the question of the authority and discretion vested by the contract in the Chief of Ordnance, the court's attention is directed to the case of *Guild* v. *Andrews* (137 Fed. Rep., 371) and the list of cases therein cited.

Respectfully submitted.

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No. 188.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1906

THE UNITED STATES, *Appellant*

vs.

THE BETHLEHEM STEEL COMPANY

BRIEF FOR THE APPELLEE

JAMES H. HAYDEN,
Of Counsel for Appellee.

IN THE

Supreme Court of the United States.

OCTOBER TERM, 1906.

THE UNITED STATES, *Appellant*,
vs.
THE BETHLEHEM STEEL COMPANY.

No. 188.

BRIEF FOR THE APPELLEE.

Statement of the Case.

On September 16, 1901, the Bethlehem Iron Company, predecessor of this appellee, filed its petition in the Court of Claims seeking to recover $21,000 as part of the price stipulated to be paid for gun-carriages, which the company had manufactured for and delivered to the United States, under an express contract with the latter (pp. 1–5).

While the suit was pending, the Bethlehem Iron Company transferred all of its contracts and other assets to the Bethlehem Steel Company, which thereupon assumed all of its contractual liabilities. This done the Bethlehem Iron Company, voluntarily, surrendered its charter and went out of existence. Under the statute (*R. S. U. S. sec. 3737*) this transfer of the contract in question rendered it void as against the United States.

On June 6, 1902, Congress passed an act (*32 Stat. L., 305, 308*) whereby it was provided that the Bethlehem Steel Company, as the successor of the Bethlehem Iron Company, should complete all contracts, theretofore made between the latter and the United States (save one which does not figure in this case); also that upon its giving security for the performance of these contracts, the Bethlehem Steel Company should be substituted therein for the Bethlehem Iron Company and "be entitled to exercise all rights thereunder which the Bethlehem Iron Company had or would have had if it had continued in existence." The Bethlehem Steel Company gave the requisite security, and on its motion (p. 6) the Court of Claims ordered that it be substituted for the Bethlehem Iron Company, as claimant in this cause (p. 7).

The contract in suit (pp. 3–5) provided that the claimant should manufacture and deliver six disappearing gun-carriages of a certain type, the deliveries of these several carriages to be made within stated periods. The United States agreed to take and pay for them at the rate of $36,000 each or $216,000 for all. It was further agreed that if any of the carriages were not delivered at the times specified, the Chief of Ordnance would be authorized to deduct a certain sum per diem for each day of delay, but it was expressly stated that any such deduction should be made as penalty. At the trial it was conceded that the carriages were manufactured, delivered and accepted. It was conceded also that they were not delivered within the

periods specified. It was conceded that the United States had paid $195,000 for the six carriages, and that the Chief of Ordnance had withheld the balance of the contract price, amounting to $21,000, as liquidated damages, which he assumed authority to deduct from the contractor's compensation on account of delays, which he attributed to it. The claimant charged that all of the delays were occasioned by acts of the defendant, and charged further that the United States having suffered no actual damage in consequence of the delays the Chief of Ordnance was not authorized to impose any penalty or to withhold payment of $21,000 or any part of the contract price.

After trial, the court entered judgment in the claimant's favor for the sum of $21,000 (*p. 14*). From that judgment the United States has appealed (*p. 7*).

The findings of fact which were filed along with the judgment (*pp. 7–14*), present the case as follows:

The claimant, the Bethlehem Steel Company, complied with the conditions prescribed by Congress (*32 Stat. L. 305, 308*) with respect to its substitution for the Bethlehem Iron Company, and was duly substituted for it as claimant in this cause (*pp. 7-8, Finding I*). On March 8, 1898, the Chief of Ordnance, U. S. Army, issued an advertisement, inviting manufacturers to present proposals to furnish six disappearing gun-carriages of a certain type to be constructed in accordance with certain plans and specifications (*p. 8, Finding II*). On March 11, 1898,, he directed letters to prospective bidders, suggesting that their proposals cover two alter-

nates—*first*, rapid delivery, such as to require the manufacturing plant performing the work to be kept in operation, day and night; *second*, "less rapid" delivery feasible by the operation of the plant, during ordinary working hours (*p. 8, Finding III*). On March 19, the claimant submitted four distinct proposals, by each of it offered to furnish five or more carriages. (*Id., p. 8*). The terms of the several proposals were as follows: (1) $31,000 per carriage, the first one of them to be delivered within six months after the date of the contract, the remaining five at the rate of two carriages in the course of each succeeding period of three months. (2) $33,000 per carriage, the first one of them to be delivered within five months from the date of contract and the rest at the rate of one carriage in the course of each succeeding month. (3) $35,000 per carriage, the first to be delivered within four months from the date of the contract and the rest at the rate of three carriages in the course of each succeeding period of two months, and (4) $36,000 per carriage the first to be delivered within four months, the second within five months, and the rest at the rate of two carriages in the course of each succeeding month. The department accepted the claimant's fourth proposal (*p. 9, Finding IV*). On April 4, 1898, the Chief of Ordnance sent the claimant a draft of the proposed contract (*p. 9, Finding VI*). The claimant declined to sign it and returned it at once to the Chief of Ordnance with a letter in which certain objections to it were stated, including this (*Id., pp. 9–10*):

> "We also note that the *penalty* mentioned in the contract for each day of delay in delivery of each carriage is $75, instead of $10, as is stipulated in the instructions to bidders and specifications. We made our bid under the understanding that the *penalty* for non-delivery was to be $10 per day, and we respectfully request that the contract forms be modified in accordance with this understanding."

On April 9, 1898, the Chief of Ordnance sent the claimant a new draft of the proposed contract. It contained the same provisions with respect to penalty as the first draft. It was accompanied by a letter in which he said (*Id., p. 10*):

> "In regard to the *penalty* for delay in delivery being $75 per day instead of $10 per day, I have to state that the former amount is the average difference in time of delivery between your price recently bid for slow delivery of these carriages and the price under the accepted bid. The department feels it to be just that this average difference should be the *prescribed penalty* * * * ."

On April 16, 1898, the Chief of Ordnance again wrote to the claimant (*Id., 10–11*) saying that an error had been made in his calculations which led him to name $75 per diem as the proper rate of *penalty*, and that he would change the rate from $75 to $35. On April 20, 1898, the claimant wrote to the Chief of Ordnance (*Id., p. 11*), agreeing to the proposed penal clause and suggesting that the schedule of deliveries be changed so that it would require the delivery of "the first carriage within four months,

the second within five months, and the remaining four at the rate of two per month." On April 25, 1898, the Chief of Ordnance replied (*Id., p. 12*) that the proposed change of schedule would be adopted "without enforcement of *penalties* which would result therefrom." With his letter he enclosed a new draft of the contract, embodying the amendments agreed upon. The contract as executed (*pp. 3–5*) bore date April 4, 1898, though for obvious reasons it could not have been signed by either party until after April twenty-fifth.

It contained these clauses:

> "Under advertisement dated ——— 189–, the said parties of the first part (Bethlehem Iron Compay) do hereby contract and engage with the said United States to manufacture for the Ordnance Department, U. S. Army, in accordance with said instructions to bidders as amended, specifications and drawings all of which are hereto attached and form part of this contract."
>
> * * * * * * *
>
> "Six (6) Disappearing Gun Carriages, Model 1896, for 12-inch B. L. Rifles, drawings dated April 27 and June 19, 1896, (latest revision July 14 and December 30, 1897,) at thirty-six thousand dollars ($36,000) each, free on board cars at South Bethlehem, Pa.
>
> The first carriage to be delivered within four (4) months from date of this contract, and the remaining five (5) carriages within six (6) months from date of this contract."
>
> * * * * * * *

"It is further stipulated and agreed that if any carriage herein contracted for is not delivered by the party of the first part at the times specified herein, there will be deducted, in the discretion of the Chief of Ordnance, thirty-five ($35) dollars per day from the price to be paid therefor for each day in delivery of each carriage respectively. But if at any time the Chief of Ordnance shall decide that continuous and great delay or other serious default has occurred, he may, to protect the interests of the United States, apply the provisions of the 5th section of the regular contract form and waive further per diem deduction in price.

All *penalties* incurred under this contract shall be offset against any payments falling due to the said party of the first part."

The gun-carriages having been manufactured by the Bethlehem Company were delivered to and accepted by the United States on the following dates: (1) January 28, 1899; (2) March 6, 1899; (3) April 13, 1899; (4) March 18, 1899; (5) April 29, 1899, and (6) May 27, 1899. The intervals between the stipulated and the actual dates of delivery ranged from 165 to 204 days and in the aggregate amounted to 1,096 days (*p. 12, Finding VII*). The Chief of Ordnance declared that the claimant was responsible for delay to the extent of 100 days on each carriage, or 600 days in all. Instead of $216,000, the full contract price, he paid the claimant for the six carriages $195,000. The difference, amounting to $21,000, was charged to the claimant as liquidated damages at the rate of $35 per diem (*pp. 12–13, Finding VII*). On June 28, 1901, the

claimant received the sum paid and receipted for it under protest, whereby it asserted its right to receive the contract price in full, and declared that the receipt of the lesser sum must not be considered a waiver of its rights to demand, sue for and recover the balance (*Id., pp. 12–13*). The court found as an ultimate fact that agents of the United States hindered and delayed the claimant in the performance of its work by changing the design of the carriages, and in various other ways; but that the claimant contributed to the delay by failing to provide sufficient equipment and by undertaking work other than that required by the contract in suit. The court was unable to determine the extent to which the respective parties had contributed to the delay. It found as a fact that the United States was not ready to make use of the carriages when they were delivered and could not have used them if they had been delivered sooner, also that the United States did not suffer any damage whatever in consequence of the delay (*pp. 13–14, Finding VIII*).

The opinion of the court below (p. 14) is brief, but shows that the case was fully considered and the following conclusions reached: (1) The penal clause of the contract as written and as understood by the parties provided that in case of default on its part, the claimant should forfeit, as *penalty*, an amount equal to the damage suffered by the United States, but did not authorize a deduction from the claimant's compensation, as liquidated damages; (2) The government having suffered no actual damage in consequence of the delay, the de-

duction made at the rate of $35 per diem on each carriage would have been excessive, even if the delay had been wholly attributable to the claimant.

ARGUMENT.

I.

1. *The contract in suit is free from ambiguity and the parties are bound by it. Resort cannot be had to their transactions which occurred while the contract was in fieri, for the purpose of showing that they intended something different from the import of the language employed in the instrument.*

As we have seen the penal clause of the contract (p. 4) provided for a deduction, to be made in the discretion of the Chief of Ordnance, in the event of claimant's default, and then, in terms, referred to the deduction as a *penalty*.

The findings of the Court of Claims disclose several proposals, presented by the claimant for the manufacture of the gun-carriages, in question and other transactions of the parties which occurred while the contract in suit was *in fieri* (*pp. 8–12, Findings II–VI*). But one proposal was mentioned in the contract and by that the contractor offered to furnish the carriages for the sum of $36,000 each. The appellant seeks to have the court interpolate into the contract all of the preliminary transactions, and upon them bases an argument to the effect that the motive of the Chief of Ordnance in accepting the claimant's tender referred to in the contract was to secure extreme celerity, in the delivery of the carriages. In other words the appellant, by this means, seeks to make it appear that what the parties, by their contract

termed *penalty*, was, in reality, a species of bonus, which the government was willing to pay for early deliveries, and that it represented the agreed worth of rapidity in manufacture. This is a novel position for the United States to take. Heretofore, in suits against the United States it has often been argued by claimants that proposals submitted by them or representations made to them with respect to the subject-matter of proposed contracts should be considered by the court when interpreting the formal instruments. The United States has invariably insisted that the strict rule of the common law forbidding the admission of extrinsic evidence to modify the terms of written contracts, when apparently free from ambiguity, must be adhered to. With entire consistency, this court and the court below have approved the contention of the United States and been governed by the common law rule. In the case of *Simpson et al* v. *U. S.* (*172 U. S., 372, 379*), Mr. Justice White, delivering the opinion of the court, said:

> "Considering the facts above stated it is at once apparent that the claim against the United States can only be allowed upon the theory that it is sustained by the written contract, since if it be not thereby sanctioned it is devoid of legal foundation. The rule by which parties to a written contract are bound by its terms, and which hold that they cannot be heard to vary by parol its express and unambiguous stipulations, or impair the obligations by reference to the negotiations which preceded the making of the contract or by urging that the pecuniary result which the contract has produced has not come

> up to the expectations of one or both of the parties is too elementary to require anything but statement.'

In the case of *Brawley* v. *U. S.* (*96 U. S., 168, 173*), there were findings whereby the Court of Claims set out transactions of the parties, which had occurred, prior to the execution of the contract. Mr. Justice Bradley, delivering the opinion of this court, said:

> "All this is irrelevant matter. The written contract merged all previous negotiations, and is presumed, in law, to express the final understanding of the parties. If the contract did not express the true agreement, it was the claimant's folly to have signed it. The court cannot be governed by any such outside consideration."

To the same effect are *Van Buren* v. *Digges* (*11 How., 461, 466*); *Harvey et al* v. *U. S.* (*8 C. Cls., 501*, II) *506, 508.*

II.

2. *If they were relevant matter, the negotiations of the parties, which preceded the execution of the contract, would not sustain the contention of the United States, to the effect that the stipulation concerning penalty was intended to provide for a deduction, as liquidated damages, or something else.*

A review of the preliminary correspondence which passed between the Chief of Ordnance and the Bethlehem Company shows that the parties understood what they were doing when they signed the contract, and that the penal clause providing in terms for the imposition of *penalty* in case of the contractor's default, was framed

by the Chief of Ordnance, exactly as he wished it to be framed. The contract was drawn by him no by the claimant. The liability to be incurred by the contractor for delay in delivering the carriages, was referred to by the Chief of Ordnance as *penalty* in letters which he directed to the claimant on April 9, 1898 (*p. 10*), and April 25, 1898 (*p. 12*), and was denominated *penalty* by the Bethlehem Company in its letters, written to the Chief of Ordnance on April 5, 1898 (*pp. 9–10*), and April 20, 1898 (*p. 11*). There is nothing to indicate that the parties attempted to ascertain what loss the government would suffer from delay, or that they fixed by agreement the measure of damages to be recovered in case of the company's default. No rational flight of imagination could lead to a construction of the contract, such as the Attorney General asks the court to adopt, namely: that the sum to be paid to the contractor was not fixed; but left to be determined in accordance with a sliding scale of rates, whereby a certain minimum should represent the price of a carriage as such, and in addition thereto appropriate allowance should be made as a reward for rapid work. Before such a conclusion could be reached the court would be obliged to expunge the existing contract, and write a new one for the parties.

In the case of *Dakin* v. *Williams* (*17 Wendell, 447*), Nelson, Ch. J., said:

> "From a critical examination of all these cases and others that might have been referred to, it will be found that the business of the court in construing

this clause of the agreement, as in respect to every other part thereof, is to inquire after the meaning and intent of the parties, and, when that is clearly ascertained *from the terms and language used*, it must be carried into effect. *A court of law possesses no dispensing powers it cannot inquire whether the parties have acted wisely or rashly in respect to any stipulation they may have thought proper to introduce into their agreements.* If they are competent to contract within the prudential rules the law has fixed as to parties, and there has been no fraud, circumvention or illegality in the case, the court is bound to enforce the agreement."

3. *The contract is to be interpreted as one which provided for a forfeiture or penalty, in case of the contractor's default.*

Apart from the plain and unambiguous terms of the instrument, the fact that the delay, *caused by both parties*, did not occasion actual damage to the United States, and the further fact that a deduction made as liquidated damages, at the arbitrary rate of $35 per diem on each carriage, would be extortionate and lead to an unjust result, furnish sufficient reasons for the conclusion reached by the Court of Claims (p. 14).

Questions of the same general nature as the one before us have been passed upon by this court and other courts of this country, as well as by those of England. At first glance these authorities seem to present inconsistencies, but upon more careful inspection the apparent differences of opinion are accounted for by differences in the terms of the contracts considered and in the facts presented by the several cases. Taking

them altogether, these rules may be, fairly, deduced: (*a*) In the absence of cogent reasons, a court will not allow claims for liquidated damages where the contract in question does not, in terms, stipulate for them. (*b*) Where the language employed in contracts is obscure, courts are strongly inclined to interpret them as calling for forfeitures, to be made as penalty, rather than for liquidated damages; and (*c*), in the absence of actual damage, consequent upon one party's default, the court will not, if the terms of the contract permit any latitude, award liquidated damages; but will interpret the contract as calling for penalty, rather than permit a recovery of imaginary damages, where none have in fact been suffered.

In the case of *Tayloe v. Sandiford*, (*7 Wheat., 13, 17*), Marshall, Ch. J., delivering the opinion of the court, said:

> "In general a sum of money in gross to be paid for the non-performance of an agreement is considered as a *penalty*, the legal operation of which is to cover the damages which the party, in whose favor the stipulation is made, may have sustained from the breech of the contract by the opposite party. It will not, of course, be considered liquidated damages, and it will be incumbent on the party, who claims them as such, to show that they were so considered by the contracting parties. *Much stronger is the inference of its being a penalty when it is expressly reserved as one, the parties denominating it themselves a penalty, and it would require very strong evidence to authorize the court to say that their own words do not express their own intention.* These writings appear

to have been drawn on great deliberation, and no slight conjecture would justify the court in saying that the parties were mistaken in the import of the terms that they employed."

The Supreme Court of New York, in the case of *Spencer* v. *Tilden* (*5 Cow., 150*), said:

"This doctrine, which converts damages apparently stipulated or fixed by the parties into a penalty, came from the civil law, through the court of chancery, and has at length obtained a firm hold in the courts of common law. It is obvious that in order to enforce it, courts must disregard the particular expressions of the parties; for the moment we agree that a party may, by calling a real penalty liquidated damages or throwing it into the form of an alternative in a contract, or substituting its payment for some specified default, to secure the whole himself, without regard to the real damages, bring back the oppressive rule of the common law. The gripping creditor will always use the particular form of phraseology of contract which will secure him his pound of flesh, unless the courts interfere in all cases and tell him that, from the very nature and essence of his bond, whatever he claims, and in whatever shape or upon whatever footing, if it be in truth, plainly beyond the legal amount of damages, so far it shall be no more than nominal."

In the case of *Van Buren* v. *Digges* (*11 How., 461*) the contract considered related to the construction of a house and provided that, if the builder did not complete it by a day certain he should forfeit ten per centum of the contract price. The court said (pp. 476–477):

"The second exception by the defendant states that in addition to the evidence previously tendered by him, he offered proof tending to show the peculiar adaptation of the house contracted for, both in its design and situation to the defendant's personal and professional pursuits and convenience, and that the amount of ten per centum on the contract price stipulated to be forfeited if the house were not entirely finished and ready for occupation as therein provided, on the 25th of December, 1844, was intended by the parties as and for liquidated damages that would result and fairly belong to the said defendant by reason of said failure to finish the said house on the 25th of December, 1844, and that the court refused to hear the evidence thus tendered. *In the refusal of the court to admit the evidence thus tendered we think they decided correctly. It would have been irregular in the court to go out of the terms of the contract and into the consideration of matters wholly extraneous, and, with nothing upon the face of the writing pointing to such matters as proper or necessary to obtain its construction or meaning. The clause of the contract providing for the forfeiture of ten per centum on the amount of the contract price, upon failure to complete the work by a given day cannot properly be regarded as an agreement or settlement of the liquidated damages. The term forfeiture imports a penalty. It has no necessary or natural connection with the measure or degree of injury which may result from a breech of contract or from an imperfect performance. It implies an absolute infliction, regardless of the nature and extent of the causes by which it is superinduced. Unless, therefore, it shall have been expressly adopted and declared by the parties to be a measure of injury or compensation, it is never taken as such by courts*

> *of justice, who leave it to be enforced where this can be done in its real character, viz., that of a penalty. In a defense like that attempted by the defendant in the Circuit Court upon the essential justice and fairness of the acts of the parties, a positive immutable penalty could hardly be applied as a fair test of their merits.*"

The case of *Smith Co.* v. *U. S.* (*34 Ct. Cls., 472*), was a suit upon a contract which contained this clause (p. 479):

> "And the party of the first part (contractor) further agrees to *forfeit* the sum of twenty dollars per day for each and every day's delay in completing and delivering the work after the said date, and the amount thereof to be deducted from any sum which might be due to the said party of the first part in the hands of the light-house establishment."

The work was not completed until sixty-four days after the date named in the contract, and, on that account, the United States "deducted from the price agreed to be paid for the work the sum of twenty dollars per diem." The court found that the contractor was in default, in consequence of which the United States had suffered actual damage to the amount of $256. After a careful review of the pertinent decisions, Peelle, J., delivering the opinion said (pp. 483–484):

> "* * * We must hold that the *forfeiture* of the sum of $20 a day for each and every day's delay in completing and delivering the work was intended by the parties as a *penalty* for the failure to perform the contract, rather than the measure of injury for the delay; and this we think is the reasonable con-

struction of the language used, independent of the intention of the parties, and that, therefore, the claimant is entitled to recover the amount so deducted from the consideration price of the contract, less the sum of $256, actual damage sustained in the employment of the inspector. * * *"

Gay Manufacturing Co. v. *Camp* (*65 Fed. R., 794, 798–800; C. C. App. 4th Circuit*). The plaintiff, as receiver of the Gay Manufacturing Company, leased to the defendant certain land at a stated rental, for a term of two years, authorizing the lessee to cut timber standing upon the land, paying the lessor for the same at stipulated rates. The lease provided that, if, through the default of the lessee, the lease should be terminated prior to the expiration of the term, the damage suffered by the lessor should, in addition to rent unpaid and the balance due for timber cut, include the sum of $5,000, which the parties estimated, assessed, and accepted as liquidated damages to be paid by the lessee to cover the interruption of the lessor's earnings, possible loss of rent or necessity for selling timber at prices lower than those stipulated, all of which latter items would necessarily be uncertain and difficult of ascertainment. Default was made in the payment of rent and lessors entered about six weeks prior to the end of the term. All arrears of rent and claims for timber cut were paid, subsequently, by the lessee. Lessors sued for breach of the contract, claiming $5,000 as liquidated damages. Held, that in view of the facts and the terms of the lease, the provision for payment of $5,000 as damages must be held to authorize the imposition of nothing but penalty. The court said:

> "If, from the nature of the agreement, it is clear that any attempt to get at the actual damage would be difficult if not vain, then the courts will incline to give the relief which the parties have agreed to, but if, on the other hand, the contract is such that the strict construction of the phraseology would work absurdity or oppression, the use of the term liquidated damages will not prevent the court from inquiring into the actual injury sustained and doing justice between the parties."

The case of *Halliday et al* v. *U. S.* (*33 Ct. Cl., 453, 465*) resembles closely the one at bar, though there the contract did not expressly provide, as did that of the Bethlehem Company, that, in the event of the contractor's default, the deduction from his compensation should be made as *penalty*. The contract related to the construction of a house. The house was not completed within the time stipulated. The penal clause read:

> "In case of neglect or failure of the said parties of the first part (contractors) to complete the above-mentioned house agreeably to and in conformity with the specifications and plans and the terms on the contract, on or before the date specified for the completion thereof, there shall be deducted the sum of twenty-five dollars per day from the amount thereunder, *in the discretion of the Secretary of the Smithsonian Institution, for each and every day that the completion and erection of said house as agreed may be delayed beyond the time specified in this contract.*"

The Secretary ordered that there be deducted from the contractor's compensation a certain sum as agreed and

liquidated damages. Notwithstanding the fact that the *deduction* provided for was to be made in the discretion of the Secretary of the Smithsonian Institution, the court held that the contractor was liable for nothing but penalty, the amount of which must be determined by that of the actual damage suffered by the government. The court gave the claimant judgment for the unpaid balance of the contract price, less the actual damage.

In the case of *Davis et al.* v. *U. S.* (*17 Ct. Cls., 201*) it was held that:

> "In determining whether the amount named in a contract shall be taken as a penalty or as liquidated damages, courts are influenced largely by the reasonableness of the transaction and are not restrained by the forms of the agreement nor by the terms used by the parties, nor even by their manifest intent, which will be carried out so far only as it is right and reasonable."

In the case of *Edgar Thompson Works Co.* v. *U. S.* (*34 Ct. Cls., 205*) claimant sued for an unpaid balance of the price fixed by contract for the work done. Payment of this balance had been withheld by the government, alleging that the contractor had made default by reason of which it became liable for liquidated damages equal to the balance. The contract provided:

> "And the party of the first part (contractor) further agrees to forfeit the sum of twenty-five dollars per day as liquidated damages, for each and every day's delay in completing either portion of the work embraced in the two deliveries, after the said times, the

amount thereof to be deducted from any sum which might otherwise be due the said party of the first part in the hands of the light-house engineer."

After reviewing a large number of authorities, the court said (p. 220):

"Words of penalty and words of liquidation are used in the contract. The party is to forfeit the sum of $25 per day as liquidated damages."

Again (p. 221):

"Each case must be governed by its peculiar facts, and no general rule can be prescribed in doubtful cases to determine the question as to whether the provision is to be regarded as a penalty or be enforced as compensation for the injury. The contract of the parties will be enforced as liquidated damages if conscionable, but, in doubtless cases, will be construed as a *penalty;* and thereby enforce against the delinquent a responsibility only to the extent of allowing the injured party *a just compensation for the injury sustained.*"

Again (p. 222):

"Taking into consideration the doubtful and contradictory language of the agreement in connection with the unreasonable result as to damages in applying the theory that the agreement is to be construed as fixing a compensation, it is the opinion of the court that the deduction mentioned in the contract must be regarded in the nature of a *penalty, and as no damages are shown, claimants are entitled to*

recover the sum of $3,250, and for that amount a judgment is entered."

In the case last cited, the court quoted with approval two opinions of Attorneys General, rendered in response to questions not unlike the one before us. In a case where the contract provided that $50 per day should be forfeited "to be deducted from the amount which may be due, on the completion of the work, as liquidated damages" Mr. Attorney General Devens said (*15 Opin., 418*):

> "The contract, as I understand from your letter having been faithfully performed and no damage whatever having been sustained by the government by reason of the delay in its performance, the conditions which, in the contemplation of the agreement are necessary for the exaction of the penalty under consideration do not exist. To exact it from the contractor under these circumstances would not be warranted by the law or justice of the case. I am therefore of the opinion that you are authorized to release him from that penalty."

Taking the same view of the law, Mr. Attorney General Olney said (*21 Opin., 28*):

> "Inasmuch as the forfeiture or penalty incurred here was one imposed by the contract between the parties and not by any act of Congress, and the work contracted for has all been finished according to the contract, and no actual damage has resulted to the United States, and the penalty was one from which, in like cases, a court of equity would grant relief, I am of opinion that the Secretary of War has authority

> to remit the forfeiture provided for in the contract and to order payment of the entire sum withheld from the contractor."

It should be noted that, if the two contracts considered by the Attorneys General had provided for deductions to be made as liquidated damages, an executive officer would not have been authorized to waive the government's right to deduct the same, any more than he would have been authorized to give away tangible property belonging to it.

The extent to which the courts are governed by the fairness and justice of the results obtained by treating a stipulated forfeiture as a penalty or as a measure of damage, is well stated in the American and English Encyclopedia of Law (Vol. 19, 2d Ed., p. 411):

> "It has been held that the magnitude of the stipulated sum should be regarded not only as compared with the value of the subject of the contract, but with reference to its proportion to the probable consequences of the breach and where a stipulated sum is so great that it is apparent that the provision was inserted *in terrorem*, it will be held to be *penalty* and not liquidated damages." (Citing *Scofield* v. *Tompkins, 95 Ill., 190; Wilcus* v. *Kling, 87 Ill., 107; Bradstreet* v. *Baker, 14 R. I., 546; Fitzpatrick* v. *Cottingham, 14 Wis., 237; McCann* v. *Albany, 11 N. Y. Appellate Div., 378.*)

As stated by the court below in its opinion (p. 14) a deduction from the contract price of one of the gun-carriages in question at the arbitrary rate of $35 a day, for

delay covering one year, would have amounted to $12,-775, or more than 35 per cent. of the price of the carriage. Consider this in connection with the fact found, that the government was not prepared to use the carriages when they were actually delivered, and that the government suffered no loss in consequence of the delay in their delivery, and we may, without the least unfairness, say that the rate of penalty named in the contract was inserted by the Chief of Ordnance *in terrorem*.

4. *Replies to Appellee's Argument.*

(*a.*) *Time was not of the essence of the contract.* The Attorney General contends that it was (*Brief, pp. 8 and 9*). To sustain that proposition, he must, according to the authorities cited by him (*Taylor* v. *Longworth, 14 Peters, 172, 174*; *Jones* v. *U. S., 96 U. S., 24*; *Secombe* v. *Steele, 20 Howard, 94–104*) show that it was made so by express stipulation or by implication from the nature of the property and the avowed objects of the seller and purchaser. Aside from naming a period within which the gun-carriages should be delivered, the contract in suit contains nothing to indicate that time was of the essence. The penal clause itself shows that the parties contemplated the possibility of delays occasioned by acts of one or both of them. Neither can it be implied from the nature of the property that time was of the essence. The conduct of the parties and the situation of the United States shows that it was not. The progress of the work was hindered by changes ordered by the Chief of Ordnance. The carriages were accepted with-

out complaint long after the date fixed by contract for their delivery. The United States was not ready to make use of them when delivered. It could not have made use of them had they been delivered sooner. It would simply have been put to the expense of storing and caring for them.

(*b.*) *As shown in division 3 of this argument, the contract provided for the imposition of penalty in case of default, and authorized no other manner of deduction from the contract price.* The Attorney General contends that, notwithstanding the express terms of the contract, it was contemplated by the parties (1) that in case of the contractor's delay, deductions from the contract price would be made at an arbitrary rate per day, as liquidated damages (*Brief, pp. 10–24*), or (2) that the parties intended to provide for the payment of $31,000 each for the carriages, plus a bonus at the rate of $35 per day on each carriage, if delivered before the times mentioned in the claimant's proposal No. 1 (p. 8), provided that, bonus included, the price paid for each carriage should not exceed $36,000. (*Brief, pp. 24–25.*) Most of the authorities cited in support of the first of these propositions are cited and relied on in this brief to support the position taken by the appellee. Not one of them sustains the government's contention. With respect to the second proposition advanced by the Attorney General, I can only repeat, what I have already stated, that it is utterly without foundation, and that, without demolishing the contract itself and constructing a new one out of suppositions as to what the parties

meant to do or should have done, the court cannot convert a deduction into a bonus or a penalty for delay into a premium for rapidity of work.

But one case cited by the Attorney General appears to require notice, namely, *Sun Printing & Publishing Co.* v. *Moore* (*133 U.S., 642*). It is readily distinguishable from the case at bar. It grew out of a charter party by which the association hired Moore's yacht for a definite term. The charterer agreed to keep the vessel in repair, to pay all of her running expenses, and, upon the expiration of the charter, to return her in good condition. In other words, the association became a bailee for hire with the absolute obligation to return the property. It was further provided that in case of the charterer's default in this particular it should pay to the owner a certain sum, representing the agreed value of the yacht. While in the service of the charterer, the yacht was lost. The owner demanded payment of her agreed value, together with charter money, and, upon the refusal of the association to pay it, brought suit. This court held that the charterer's obligation to return the vessel being fixed and unqualified, and the value of the vessel, according to the terms of the contract, having been ascertained and agreed upon by the parties, it would be doing violence to the plain language and obvious intent of the parties to permit the charterer to show by way of partial defense that she was worth less than the stipulated value.

Between the parties to the case at bar, the relation of bailor and bailee did not exist. It is conceded that the gun-carriages delivered were those contracted for, and, as such, they were accepted by the United States. There

was no agreement with respect to, nor any intelligent attempt to ascertain, what damage, if any, the United States would suffer, if the delivery of the carriages were delayed through the contractor's fault. It does not matter, who may have been responsible for the delay, we know that the United States suffered no damage in consequence of it. While the penal clause in the contract, like all clauses of that kind, did name a definite rate of penalty, this was intended simply to cover any actual damage, occasioned by a possible default, the effect of which could not be foreseen but might well be ascertained after the occurrence.

I submit that the court below committed no error.

JAMES H. HAYDEN,
Of Counsel for Appellee.

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No. 188.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1906.

THE UNITED STATES, APPELLANT,

v.

BETHLEHEM STEEL COMPANY.

Supplemental Brief for the Appellee.

At the argument of this cause, three questions were discussed concerning which a supplemental statement may be of service to the court.

I.

Responsibility for delay in the delivery of the gun carriages.

By its seventh finding (pp. 12 and 13) the Court of Claims found that the delays in the deliveries of the six carriages aggregated 1,096 days; that the Chief of Ordnance decided that delays to the extent of 496 days were attributable to acts of the defendant, (United States), and that the balance of the delays, amounting to 600 days, were attributable to the claimant (Bethlehem Company). In its eighth finding the court said (p. 13):

> "The court finds as the ultimate fact that the *defendant's (United States)* officers *hindered* and *delayed the claimant (Bethlehem Company) in the performance of the work by changes in the plans of*

construction, as alleged in the petition and in various other ways, but the court also finds that the claimant (Bethlehem Company) contributed to the delay in the completion of the work, by being insufficiently equipped and prepared to complete it within the time prescribed in the contract and by taking other work to the exclusion of that referred to in these findings. And the Court further finds that the transactions in the process of manufacture were so involved and intermerged *that it is impossible on the evidence produced, for the court to ascertain and determine whether the defendants (United States) should be charged with a greater proportion of the delays set forth in the foregoing table in finding VII than those assumed by the defendant's (United States) officers, to wit* 496 *days,* out of the total amount of delays, to wit, 1096 days."

I submit that the meaning of the finding is this: Both parties—the United States and the contractor—contributed to the delays. Because of the extent and complicated character of the work involved in the manufacture of the carriages, the Court of Claims could not determine from the evidence offered by the claimant and defendant whether the United States should be held responsible for more than 496 days of the delay, that being the amount for which the Chief of Ordnance conceded the Government's responsibility.

The Chief of Ordnance was not qualified to act as an arbiter in apportioning responsibility for the delay. His mere statement cannot be regarded as an award which was binding upon the Bethlehem Company. The Chief of Ordnance was a party to the contract. He drew the instrument, and all business with respect to its execution and performance was conducted by him or by his authority. It is not permitted to any man to be both a party and the judge in one cause (*Barlow v. U. S.,* 35 Ct. Cls., 514, 543-545). Hence the so-called decision of the Chief of Ordnance, whereby he declared that the contractor was responsible for delay to the extent of 600 days, is to be regarded as no more than an expression

of his views on the subject. The finding shows that the court did not accept his views and was not able to state whether he had dealt fairly with the Bethlehem Company or not. The Chief of Ordnance made his apportionment of responsibility for the purpose of reducing the Bethlehem Company's compensation below the figure stipulated in the contract; in other words, for the purpose of exacting a forfeiture. The law abhors forfeitures and the courts will not uphold them unless the fact that they have been incurred is clearly proven. The finding shows that the Bethlehem Company's responsibility for the full extent of the default charged to it by the Chief of Ordnance was not proven. That being the case, the Chief of Ordnance had no right to claim it, and the Court of Claims was right in refusing to uphold his so-called decision.

II.

The parties are bound by their contract. It was drawn by the Chief of Ordnance. If, through ignorance or carelessness on his part, it was made to provide for the imposition of penalty in case of the contractor's default when it would have been more convenient or desirable for the Government to have had a clause providing for the deduction of liquidated damages, that fact cannot be considered a valid reason for disregarding the plain terms of the instrument.

In his closing argument for the appellee, the Attorney General suggested that, while Secretary of the Navy, he had been obliged to revise many of the contract forms which were in general use in the Navy Department, because his subordinates did not appear to understand the difference between *penalty* and *liquidated damages*, and in drawing their contracts customarily made provision for the imposition of penalty when the convenience or advantage of the Government would have been better served by pro-

visions authorizing the deduction of liquidated damages. This suggestion was made apparently with the idea that the court should assume that in this case the Chief of Ordnance of the War Department and the Bethlehem Company mutually made the same mistake when they used the word penalty. I submit that it cannot be assumed that an official of the War Department made the mistake detected by the Attorney General among officials of the Navy Department. I submit further that, even if he did, it cannot be assumed that the Bethlehem Company fell into the same error. The record shows that the contract was made in the most deliberate fashion, having been drafted and redrafted by the Chief of Ordnance. To use the words of Chief Justice Marshall, found in his opinion in the case of *Taloe v. Sandiford* (7 Wheaton, 13, 17):

> "No slight conjecture would justify the court in saying that the parties were mistaken in the import of the terms that they employed."

I submit that the Attorney General's admission with respect to the change, that he, as Secretary of the Navy, found it necessary to make in the contract forms of his Department, in order that they might authorize the deduction of liquidated damages, is a most forceful argument in support of our contention that the contract in suit is to be interpreted as one which authorized no deduction from the contractor's compensation unless made as *penalty*.

III.

The United States having suffered no damage in consequence of the delay in the delivery of the carriages, the Bethlehem Company is entitled to recover the balance of the contract price remaining unpaid.

The court's attention was called to the fact that the Court of Claims had found this (pp. 13 and 14):

> "It does not appear that the defendants were ready to use the gun carriages hereinbefore described at the time when they were finally delivered by the claimant; nor does it appear that they could have used them on their fortifications if they had been delivered at an earlier day. Nor does it appear that the defendants suffered any injury or damage whatever by the delay of the claimant in delivering the said gun carriages hereinbefore set forth."

The Attorney General argued that, if these facts were sufficient to deprive the Government of the right to impose penalty for default, a party having a contract for the construction of a battleship might delay her completion for several years, and upon her delivery say to the Government, "You have not been damaged. I have saved you the cost of maintaining this vessel during the period of delay." He overlooked this most essential feature of the finding: the United States, according to the Court of Claims, was not prepared to *use* the gun carriages in question when they were delivered, and could not have *used* them if they had been delivered sooner. Had they been delivered sooner, it could have done nothing but store them. The fortifications wherein they were to be installed had not been completed. Such a situation differs materially from a case where the delivery of a completed battleship has been delayed, for there the Government presumably would have been prepared to *use* her from the moment of her delivery.

Respectfully submitted,

JAMES H. HAYDEN,
Of Counsel for Appellee.

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SUPREME COURT U. S.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1906.

No. 188.

THE UNITED STATES, APPELLANT,

vs.

BETHLEHEM STEEL CO.

APPELLEE'S PETITION FOR REHEARING.

JAMES H. HAYDEN,
Of Counsel for Appellee.

JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C. 25977

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APPELLEE'S PETITION FOR REHEARING.

Now comes the appellee and respectfully prays the court to restore the above cause to the docket and order a reargument thereof.

A rehearing of the cause is sought by the appellee upon the following propositions:

1. The contract in suit is free of ambiguity and there was no occasion or justification for a resort to the preliminary correspondence of the parties and other extraneous matter to ascertain its meaning.

2. The contract in suit authorized the Chief of Ordnance, U. S. Army, to reduce the compensation payable to the contractor, in the event of the latter's default, by the imposition of penalty. The term "penalty" was used by the parties in the contract and in their correspondence. There is no justification for supposing that either of them executed the contract in ignorance of its meaning or that the contract as written did not express their intention. The fact that the financial result would have been more satisfactory to the United States if the contract had provided for the deduction of liquidated damages, instead of penalty, cannot be taken

as proof that the parties believed the terms "penalty" and "liquidated damages" to be synonymous.

3. The deduction authorized to be made from the contractor's compensation, in case of delay, was not based upon any estimate of the value to the United States of the gun carriages, nor upon any agreement of the parties fixing the amount of damage that delay in their delivery would cause the United States; hence the penal clause of the contract lacked the most essential element of a stipulation for liquidated damages.

4. The facts established by the finding of the Court of Claims (VIII) do not show that the claimant made default to the extent of 600 days. Such default alone could justify the deduction of $21,000 made by the United States from the claimant's compensation.

JAMES H. HAYDEN,
Of Counsel for the Appellee.

CERTIFICATE OF COUNSEL.

The undersigned, a member of the bar of this honorable court, believing that the foregoing petition possesses merit and warrants the granting of a reargument of this cause, respectfully certifies accordingly.

JAMES H. HAYDEN.

BRIEF IN SUPPORT OF APPELLEE'S PETITION FOR REHEARING.

It appears from the opinion of the court that its decision turned upon three questions:

1. Whether or not the penal clause of the contract was ambiguous, and hence whether or not resort could be had to the correspondence between the parties and certain alternative bids, which preceded the execution of the contract and none of which was incorporated or referred to therein, for purposes of interpretation.

2. Whether or not, considering the contract by itself or in connection with the preliminary correspondence and alternative bids, the term *"penalty"* can be interpreted to mean *"liquidated damages."*

3. Whether or not the Court of Claims, by its eighth finding of fact, determined that the Bethlehem Company was responsible for delay in the performance of its contract, to the extent of at least 600 days.

I.

Whether or not the penal clause of the contract was ambiguous, and hence whether or not resort could be had to the correspondence between the parties and certain alternative bids, which preceded the execution of the contract and none of which was incorporated or referred to therein, for purposes of interpretation.

By reading into the contract in suit the correspondence between the Chief of Ordnance and the Bethlehem Company and the three alternative bids, which were rejected, for the purpose of interpreting the penal clause, the court has re-

pudiated the doctrine followed by it and by the Court of Claims, to the effect that, in the absence of ambiguity on the face of a contract, no resort can be had to proposals, or the preliminary correspondence between the parties, which were not incorporated in the contract.

In many such actions claimants have urged the court to consider transactions of that kind on the plea that they disclosed matters of inducement or showed that the contracts had been entered into by the parties laboring under a mistake of fact. In all of these cases the United States has stubbornly contended for a strict enforcement of the common-law rule, and it has always been sustained in that contention. As one of the learned justices remarked at the hearing of this case, "It is a poor rule that does not work both ways;" yet here we find the government, for reasons of convenience, calling upon the court to make an exception in its favor, and I respectfully submit that by the decision of this honorable court, such an exception has been made.

I submit that the meaning of the term "penalty" has been well understood for years. Its meaning, when used as it was in the contract now under consideration, has been stated by this court and the Court of Claims, and should have been known to all of the executive departments of the government. I submit that the contract was free of ambiguity, and that there was no justification for a resort to the preliminary transactions.

In the case of *Brawley v. U. S.* (96 *U. S.*, 168, 173), cited in the present opinion, the principal question related to the admissibility of correspondence which led to the making of the contract. The court said:

> "All this is irrelevant matter. The written contract merged all previous negotiations and is presumed in law to express the final understanding of the parties. If the contract did not express the true agreement, it was the claimant's folly to have signed it. The court cannot be governed by any such outside considerations. Previous and contemporary

> transactions and facts may be very properly taken into consideration to ascertain the subject-matter of a contract and the sense in which the parties may have used particular terms, *but not to alter or modify the plain language which they have used.*"

It is respectfully suggested that the court has overlooked the last clause of this quotation, which materially qualifies the dictum which preceded it. The last clause set forth the rule which the court followed in deciding the case. It is directly opposed to the contention of the United States in the case at bar. The language of the contract involved in the Brawley case was far less explicit and offered better excuse for a resort to extraneous matter than the language employed in the contract of the Bethlehem Company.

On this question, the court cited, also, the case of *Greenlief W. Simpson v. U. S.* (199 *U. S.*, 397, 399). That grew out of a contract to supply beef to the United States forces in Cuba "at such posts and camps as are situated in the interior of the Island." The United States refused to take beef tendered at a camp situated two and one-half miles from the seacoast. On this refusal Simpson based his claim for damages. The court declined to admit proof of statements made by the Commissary General to Simpson before the contract was signed, but finding the clause "at such posts and camps as are situated in the interior of the island" ambiguous, it resorted to an advertisement under which Simpson had made his bid, though not the one referred to in his contract. The former advertisement described the places where he was to supply beef as "posts remote from the seacoast," and held that when interpreted in the light of the first advertisement, and of the construction placed upon it by army officers during the performance of the contract, in which construction Simpson tacitly acquiesced, the contract did not entitle the claimant to furnish beef at the post in question. The language used in Simpson's contract was ambiguous and the court's ruling in his case cannot serve

as an authority for the case at bar. Beside that, there was not in the present case, as there was in Simpson's, a practical construction of the contract by the parties. It was not until the Bethlehem Company had performed the contract fully on its part that the government refused to pay the full price stipulated, claiming that the "penalty" provided for was, or of right ought to be, the same thing as *liquidated damages*.

In the case of *J. E. Simpson & Co. v. U. S.* (172 *U. S.*, 372, 379), it appeared that the advertisement tendered to prospective bidders information with regard to the site on which the government desired to have constructed a dry-dock. A profile of the dock site was made by the Navy Department and exhibited by it to the Simpsons and other intending bidders for their information and guidance in estimating the character and extent of the work called for. The Simpsons accepted the showing made by the profile as correct and were governed by it. The profile was radically wrong. In consequence the contractors were obliged to furnish a great amount of labor and material which would not have been needed if the site had been as represented. In the Simpsons' bid and in the specifications attached to the contract, it was provided that the government should furnish an *"available site"* for the dock. Contractors contended that the term "available site" was intended to mean a site like the one shown by the profile, which presented no grave engineering difficulties. The court held that the term "available site" was not ambiguous, and meant, simply, a site, which should be selected as convenient for the government in the operation of its navy yard. It declined to consider the transactions of the parties which preceded the execution of the contract. Mr. Justice White, delivering the opinion of the court, said:

> "The rule by which parties to a certain contract are bound by its terms, and which holds that they cannot be heard to vary by parole its express and

> unambiguous stipulations, *or impair the obligations which the contract engenders, by reference to the negotiations which preceded the making of the contract or by urging that the pecuniary result which the contract has produced has not come up to the expectations of one or both of the parties, is too elementary to require anything but statement.*"

This authority, I submit, is on all fours with the case at bar, and that there is less reason for going outside the contract to find what may have been meant by the word "penalty" than there was to find the sense in which the word "available" was used.

Although the Attorney General stated that, when Secretary of the Navy, in 1905, he had found it necessary to revise the forms of contract used in his department in order that they should provide for liquidated damages and not merely penalty, this court cannot assume that in 1898 the Chief of Ordnance of the Army *and the Bethlehem Iron Company* did not understand the difference between the two terms.

I submit that, in going outside the contract and reading into it proposals and correspondence which preceded its execution, the court has *first created an ambiguity,* and thereupon proceeded to remove it, basing its interpretation of the instrument upon the extraneous matter, which was not made part of it and was never intended to be part of it. This the court has declared to be "irregular" *(Van Buren vs. Digges,* 11 *How'd,* 461).

The court in its opinion states that courts are now inclined to allow the parties to carry out their own intentions as set forth in their contracts. That is precisely what I am contending for. A *penalty* was provided for in the contract, and nowhere in the contract is there a suggestion that something else was intended.

II.

Whether or not, considering the contract by itself or in connection with the preliminary correspondence and alternative bids, the term "penalty" can be interpreted to mean "liquidated damages."

In holding that the parties, who consistently used the term "penalty" throughout their preliminary correspondence and in their contract, did not understand "the technical and legal difference between penalty and liquidated damages," and that they must in fact have meant liquidated damages, this court has repudiated a doctrine often announced by it and followed by other courts. (*Taylor v. Sandiford* (7 *Wheat.*, 13, 17), *Van Buren v. Digges*, 11 *How.*, 461, 466, and many other cases cited in the appellee's brief.)

In discussing this departure from the old doctrine, the court cites the case of *Sun Printing & Publishing Association v. Moore* (183 *U. S.*, 642, 669), where the facts and subject-matter were so widely different from those in the present case that no reasonable analogy can be discovered. That case grew out of the hiring of a yacht, to be used by the war correspondents of a newspaper, during our war with Spain, in waters likely to be frequented by Spanish naval vessels. The extraordinary risks attending such employment were well understood when the contracting parties, as bailor and bailee, agreed upon the value of the yacht. The damage that the owner would sustain in case of the charterer's default, namely, his failure to return the vessel, was easily ascertainable. Both parties had every opportunity to appraise the yacht, and by their contract fixed her value, just as they would have done if she were being sold.

In the case at bar there was nothing of this kind. The Bethlehem Company delivered the gun carriages called for by the contract, and they were accepted without protest.

The naming of a certain rate of penalty for delay was based on nothing tangible, and there is no pretense that it had any relation whatever to the amount of damage or loss that the United States would suffer on account of delay. The court says that the rate of penalty was arrived at "by figuring the average difference in time of delivery between the price bid for slow delivery of the carriages and the price under the accepted bid, the department saying: 'that this average difference should be the prescribed penalty.'" This assuredly was not a basis by which it was possible to appraise the government's damage. If the department had wished to provide that the amount of the contractor's compensation should depend upon the rapidity of its work, is it not reasonable to suppose that all four of the company's bids would have been accepted, and that in the contract itself there would have been set out a scale of prices providing increased compensation for increased expedition in delivery? There is no suggestion of anything of that kind in the contract, nor was any intimation of that sort given the contractor until its work was done and it came time for the government to make settlement. In its opinion in the case of the *Sun Publishing Company*, the Court made an extensive review of the authorities dealing with the question of penalty and liquidated damages. Among those cited with approval are *Tayloe v. Sandiford* and *Van Buren v. Digges (supra)*. Both were cited and quoted by this appellee and support its contention that a contract providing for penalty alone does not authorize the deduction of liquidated damages, and that the parties are bound by their contract. Some American and English cases are referred to wherein the courts have sustained stipulations for liquidated damages; but in these the contracts considered showed that the parties had agreed upon the amount of damages that the one would suffer from the other's default. The courts did no more than enforce the contracts according to their terms.

In the case at bar the court says that "it would have been very unusual to allow the company to obtain a contract for the construction of these carriages and yet to place it under no liability to fulfill it as to the time of delivery, specially agreed upon, other than to pay only those actual damages (not exceeding $35 per day) which might be proved were naturally and proximately caused by the failure to deliver. The provision, under such circumstances, would be of no real value." It is a fact that such contracts are or were common. The Attorney General said so in the course of his argument. I respectfully submit that a provision making a contractor liable for the cost of extra inspection and all other actual damage that the government may sustain in consequence of the contractor's default has value. I submit, however, that all of this is immaterial. In the case of *Sun Printing & Publishing Co.* this court cited with approval the opinion in *Dakin v. Williams,* (17 *Wend.,* 447), where it was said:

> *"A court of law possesses no dispensing powers. It cannot inquire whether the parties have acted wisely or rashly in respect to any stipulation they may have thought proper to introduce into their agreements."*

The court also states that "if the contract were construed as contended for by the Bethlehem Company, it would receive (as events have turned out) the highest price for the longest time in which to deliver, which could not have been contemplated by either party." It cannot be assumed that either party contemplated the various delays caused by the government as well as by the company. The government agreed to pay $216,000 for the six gun carriages. It has paid for them only $195,000. The government suffered no damage in consequence of delay. The fact that the delays attributed by the Court of Claims to both parties, create a situation in which the company is entitled to receive the highest price for work done in consequence of mutual de-

linquencies in slow time is not a matter which can be considered in determining what was the intention of the parties expressed in their contract before the work was begun.

The court calls attention to the preparations for war which were in progress when the contract was signed as indicating the government's reason for wishing to receive the gun carriages as soon as possible and its willingness to pay a higher price for them if delivered quickly. Do not these facts furnish additional reasons why the department should have so drawn the contract that the contractor might have expected a deduction of liquidated damages in case of his default.

Again, if such extraneous facts as these are to be considered, must not this court consider also the conditions that developed when the work contracted for was being done. Then, the war being over, the government had no urgent need for the gun carriages—in fact, was not prepared to use them—so, instead of permitting the Bethlehem Company to complete the work as rapidly as possible, the government's agents "hindered and delayed the claimant" by ordering "changes in the plans of construction and in various other ways" (Finding VIII).

III.

Whether or not the Court of Claims, by its eighth finding of fact, determined that the Bethlehem Company was responsible for delay in the performance of its contract to the extent of at least 600 *days.*

In ordering the dismissal of the petition this court in effect has made a finding of fact to the effect that the completion of the gun carriages was delayed for 600 days through the Bethlehem Company's fault. On no other hypothesis could the court sanction the deduction of $21,000 from the com-

pany's compensation. The finding of the Court of Claims, which is conclusive on this appeal, did not state that the company was answerable for delay to the extent of 600 days. The finding reads (VIII):

> "The court finds as the ultimate fact that the defendants' officers hindered and delayed the claimant in the performance of the work by changes in the plans of construction, as alleged in the petition, and in various other ways; but the court also finds that the claimant contributed to the delay in the completion of the work by being insufficiently equipped and prepared to complete it within the time prescribed in the contract and by taking other work to the exclusion of that referred to in these findings; and the court further finds that the transactions in the process of manufacture were so involved and intermerged *that it is impossible, on the evidence produced, for the court to ascertain and determine whether the defendants (United States) should be charged with a greater proportion of the delays set forth in the foregoing table in Finding VII than those assumed by the defendants' officers, to wit,* 496 *days out of the total amount of delays, to wit,* 1,096 *days.*
>
> "It does not appear that the defendants were ready to use the gun carriages hereinbefore described; nor does it appear that they could have used them on their fortifications if they had been delivered at an earlier day. Nor does it appear that the defendants suffered any injury or damage whatever by the delay of the claimant in delivering the said gun carriages hereinbefore set forth."

This means no more than that the government was responsible for *at least* 496 days of the delay and that the responsibility for the remaining 600 days' delay could not be apportioned between the parties. The Chief of Ordnance was not an arbitrator and his arbitrary ruling is not binding. The amount of the claimant's responsibility remains undetermined. But, nevertheless, by the judgment of this court,

the company stands mulcted in damages as for an ascertained default, while the government retains the gun carriages and over 10 per centum of the contract price.

I submit that a case of such importance to the United States and to the claimant, involving principles which must govern the interpretation of many existing contracts made by persons who entered into them relying upon earlier decisions of this court and of the Court of Claims, should not be dismissed without a thorough hearing upon and consideration of the propositions of law and fact above discussed.

JAMES H. HAYDEN,
Of Counsel for Appellee.

Supreme Court of the United States.

No. 188.—October Term, 1906.

The United States, Appellant,
vs.
The Bethlehem Steel Company.
} Appeal from the Court of Claims.

[March 11, 1907.]

The Bethlehem Steel Company recovered a judgment in the Court of Claims (41 Ct. Cl. 19) for the sum of $21,000 against the appellant, from which judgment the United States has appealed to this court.

The company filed its petition in the Court of Claims seeking to recover a balance which it alleged was due from the United States on a contract, which had been entered into by the company with Brigadier General Flagler, Chief of Ordnance, in behalf of and for the United States, for the construction of certain gun carriages, which the company alleged had been constructed according to the contract and for which the Government had failed to pay the full amount which became due upon its performance.

The facts were found by the Court of Claims, from which it appears that the Government on the 8th day of March, 1898, advertised for proposals for the construction of six disappearing gun carriages, and the specifications accompanying the advertisement set forth the character and extent of the work. The claimant, in response to the advertisement, submitted four distinct sealed proposals to the War Department for the construction of such carriages. By the first proposal the company agreed to furnish five or more gun carriages for the sum of $31,000 each, the first to be delivered within six months of the date of contract, to be followed by two carriages every three months thereafter. By the second proposal the company offered to furnish the same number for the sum of $33,000 each, the first to be delivered within five months from date of contract, to be followed at the rate of one carriage every month thereafter. By the third proposal the offer was to furnish the same number for the sum of $35,000 each, the first to be delivered within four months, and the second within five months of date of contract; the remaining carriages to follow at the rate of three carriages every two months thereafter. By the fourth proposal the offer was to furnish the same number for the sum of $36,000 each, the first to be delivered in four months, the second in five months, and the remaining carriages at the rate of two carriages every month thereafter.

These alternative proposals were made in consequence of a letter written the company by the Chief of Ordnance, dated March 11, 1899, of which the following is a copy:

"Office of the Chief of Ordnance,
United States Army,
Washington, March 11, 1898.

"Gentlemen: It is suggested that in making bids for carriages you estimate, first on the price of carriages under the supposition that the works will run for twenty-four hours; second, that later, if it be found advantageous, the ordinary working hours may be observed. It is considered best that bids should be made for carriages by numbers, as, for instance, so much for five 8-inch carriages, for six, eight, etc. Therefore it is considered judicious that bids should be made for rapid delivery of a certain number of carriages or for less rapid delivery of the same. It should be understood, however, that time will be considered very important.

Respectfully,
D. W. FLAGLER,
Brig. Gen., Chief of Ordnance."

The following are the further findings of the Court of Claims:

"IV. The defendants, through the War Department, accepted proposal No. 4 of the claimant company.

"V. In drawing up the contract between the United States and the claimant company a slight modification of proposal No. 4 was decided upon, which was as follows:

"Whereas in proposal No. 4 claimant company was to deliver five or more carriages, the first in four months, the second in five months, and the remaining ones to follow at the rate of two carriages per month. In drawing up the contract this was changed so as to provide for the delivery of one carriage in four months (as proposed) and five carriages in six months from the date of contract, thus reducing the time of delivery of all the carriages from seven to six months, this reduction of the total delivery being offset by the increased latitude given claimant company as to intermediate deliveries.

"VI. On April 4, 1898, the Ordnance Department transmitted a form of contract of even date to the claimant company for execution and return by letter, as follows:

'Office of the Chief of Ordnance,
United States Army,
Washington, April 4, 1898.

The Bethlehem Iron Co., South Bethlehem, Pa.,

'Gentlemen: I am instructed by the Chief of Ordnance to transmit herewith contract, in quintuplicate, dated the 4th instant, for six 12-inch disappearing gun carriages, model 1896, for execution and return to this office.

Respectfully,
R. BIRNIE,
Capt., Ord. Dept., U. S. A.'

"To this letter the claimant company made reply on April 5, 1898:

'The Bethlehem Iron Company,
South Bethlehem, Pa., April 5, 1898.

Chief of Ordnance, U. S. A.,
War Department, Washington, D. C.

'Sir: We have examined the contract forms, covering six disappearing gun carriages, model 1896, for 12-inch B. L. rifles, for which we submitted proposals under the date 19th ultimo, and write to call your attention to the third clause, relating to our liability on account of any patent rights granted by the United States, is not struck out, as has been done in the case of previous contracts for carriages.

'We also note that the penalty mentioned in the contract for each day of delay in delivery of each carriage is $75 instead of $10, as is stipulated in the instructions to bidders and specifications.

'We made our bid under the understanding that the penalty for non-delivery was to be $10 per day, and we respectfully request that the contract forms may be modified in accordance with this understanding.

'We return herewith the contract forms, and remain,
Respectfully,

THE BETHLEHEM IRON COMPANY,
R. W. DAVENPORT,
Second Vice President.'

"Whereupon the claimant company was informed by the Chief of Ordnance, by letter of April 9, 1898, as follows:

'Office of the Chief of Ordnance,
United States Army,
Washington, April 9, 1898.

The Bethlehem Iron Company,
South Bethlehem, Pa.

'Gentlemen: In reply to your letter of April 5, 1898, returning contract forms, I have the honor to inform you that your request in regard to your liability on account of patent rights has been complied with and the third paragraph has been stricken out.

"In regard to the penalty for delay in delivery being $75 per day instead of $10 per day, I have to state that the former amount is the average difference in time of delivery between your price recently bid for slow delivery of these carriages and the price under the accepted bid. The department feels it to be just that this average difference should be the prescribed penalty; but, if you should prefer, instead of taking the average difference, that the exact difference per day for each particular carriage should be prescribed, the forms will be altered accordingly.

'The contracts are returned, hoping this explanation will be satisfactory.

Respectfully,
D. W. FLAGLER,
Brigadier General, Chief of Ordnance.'

"Thereafter it was found that an error had been made in the above computation, in that the $75 per day deduction provided for should have been $35 instead, and the claimant company was duly informed of this by letter dated April 16, 1898, which is as follows:

'Office of the Chief of Ordnance,
United States Army,
Washington, April 16, 1896.

The Bethlehem Iron Company,
South Bethlehem, Pa.

'(Through the Inspector of Ordnance, U. S. A.)

'Gentlemen: Referring to my letter, No. 21985, of the 9th instant, I would invite your attention to the fact that an error was made in the computation in the amount of the deduction in price per day of delay in delivery of 12-inch disappearing carriages, L. F., model of 1896, recently ordered from you, and to inform you that the contract should read that such deduction in price should be $35 per day of delay in delivery, in accordance with principle stated in my above-mentioned letter.

Respectfully,
D. W. FLAGLER,
Brigadier General, Chief of Ordnance.'

" Before signing the contract in its present form the claimant company, by commmunication on April 20, 1898, requested that the same should be modified in some respects, which request is contained in the following communication:

'The Bethlehem Iron Company,
South Bethlehem, Pa., April 20, 1898.

Chief of Ordnance, U. S. A.,
War Department, Washington, D. C.

'Sir: Referring to the forms of contract for six 12-inch disappearing gun carriages, carrying the date of April 4, 1898, which have recently been received, but not yet executed, and to the conversation which the writer had with you on Thursday last, we beg to state that on further carefully considering the possibilities of the case we do not believe that we will be able to deliver the six carriages within six months, as called for by the proposed contract. We will, however, undertake to complete, in accordance with our bid, the delivery of the first carriage in four months, the second within five months, and the remaining four at the rate of two per month, thus making the total time of delivery of the six carriages seven instead of six months, it being understood that no penalty will be charged against us for the one month of delay which will thus accrue on the fifth and six carriages.

'By agreeing to this proposition the department will be the gainer, in that the second carriage will be due at the end of the fifth month, while, as the contract now reads, it would not be due until the end of the sixth month.

'With the above understanding confirmed, we will execute the contract as it now stands, except as to the amount of penalty for delay in delivery, which, in accordance with your letter of April 16, will be $35 instead of $75 per day.

'We return the contract forms in order that the change as regards penalty may be made.

'We remain, respectfully,
THE BETHLEHEM IRON COMPANY,
R. W. DAVENPORT,
Second Vice President.'

"To which letter the following reply was made:

'Office of the Chief of Ordnance,
United States Army,
Washington, April 25, 1898.

The Bethlehem Iron Company,
South Bethlehem, Pa.
(Through Inspector of Ordnance, U. S. A.)

'Gentlemen: In reply to your letter of the 20th instant, I have the honor to inform you that the schedule of deliveries of 12-inch disappearing carriages contained therein will, in view of the earlier resulting delivery of the second carriage, be accepted in lieu of the schedule in the contract, without enforcement of penalties which would result from the change of schedule.

'The amount of the penalty for delay in delivery is changed from $75 to $35 per day in accordance with my letter of the 16th instant, and the contract forms are returned herewith for execution.

Respectfully, D. W. FLAGLER,
Brigadier General, Chief of Ordnance.'

"The above correction was therefore made in the said contract, and the same was duly signed and executed by the claimant company and immediately transmitted to the War Department. A copy of said contract is annexed to and made part of the petition."

The following are the material portions of the contract:

"Under advertisement dated , 189 , the said parties of the first part do hereby contract and engage with the said United States to manufacture, for the Ordnance Department, U. S. Army, in accordance with said instructions to bidders as amended, specifications and drawings, all of which are hereto attached and form part of this contract.

"Six (6) disappearing gun carriages, model 1896, for 12-inch B. L. rifles, drawings dated April 27 and June 19, 1896 (latest revision July 14 and December 30, 1897), at thirty-six thousand dollars ($36,000) each, free on board cars at South Bethlehem, Pa.

"The first carriage to be delivered within four (4) months from date of this contract, and the remaining five (5) carriages within six (6) months from date of this contract.

"It is further stipulated and agreed that the party of the first part will furnish such limited additional number of these carriages, at the price and rate of delivery stated, as the party of the second part may desire, under available appropriations.

* * * * * *

"It is further stipulated and agreed that if any carriage herein contracted for is not delivered by the party of the first part at the times specified herein, there will be deducted, in the discretion of the Chief of Ordnance, thirty-five ($35) dollars per day from the price to be paid therefor for each day of delay in delivery of each carriage, respectively. But if at any time the Chief of Ordnance shall decide that continuous and great delay or other serious default has occurred, he may, to protect the interests

of the United States, apply the provisions of the 5th section of the regular contract form and waive further per diem deduction in price.

"All penalties incurred under this contract shall be offset against any payments falling due to the said party of the first part.

"The work must pass the required inspection at all stages of its progress, and be approved by the officers of the Ordnance Department before being accepted and paid for by the United States.

(Signed by the parties.)

* * * * * *

"VII. Thereupon the Bethlehem Iron Company proceeded to manufacture the said gun carriages, and ultimately delivered them to the United States, and they were accepted by the latter. The following table gives, first, the date fixed by the said contract for the delivery of each one of said carriages; second, the date of its delivery, and, third, the extent of the delay in its delivery.

Number of carriage.	Date for delivery fixed by contract.	Date of delivery (actual).	Extent of delay.
16	August 4, 1898	January 28, 1899	177 days.
17	September 4, 1898	March 6, 1899	183 "
18	October 4, 1898	April 13, 1899	191 "
19	October 4, 1898	March 18, 1899	165 "
20	November 4, 1898	April 29, 1899	176 "
21	November 4, 1898	May 27, 1899	204 "
	Total delay		1,096 days.

"Of the above days of delay, which amounted in the aggregate to 1,096 days, the United States, through the Chief of its Bureau of Ordnance, decided that the Bethlehem Iron Company was responsible for delays to the extent of 100 days upon each of the six disappearing gun carriages, or 600 days in all, but did not charge said company with the balance of said days, or 496 days in all; which, at the stipulated sum of deduction at $35 per day for each day of delay in the delivery of each gun carriage, amounted to the sum of $21,000, which sum was deducted from the payments made the claimant company, and the balance, or the sum of $195,000, was paid over to the claimant company, who receipted for said payment under protest.

"VIII. The court finds as the ultimate fact that the defendants' officers hindered and delayed the claimant in the performance of the work by changes in the plans of construction, as alleged in the petition, and in various other ways; but the court also finds that the claimant contributed to the delay in the completion of the work by being insufficiently equipped and prepared to complete it within the time prescribed in the contract and by taking other work to the exclusion of that referred to in these findings; and the court further finds that the transactions in the process of manufacture were so involved and intermerged that it is impossible, on the evidence produced, for the court to ascertain and determine whether the defendants should be charged with a greater proportion of the delays set

forth in the foregoing table in Finding VII than those assumed by the defendants' officers, to wit, 496 days out of the total amount of delays, to wit, 1,096 days.

"It does not appear that the defendants were ready to use the gun carriages hereinbefore described at the time when they were finally delivered by the claimant; nor does it appear that they could have used them on their fortifications if they had been delivered at an earlier day. Nor does it appear that the defendants suffered any injury or damage whatever by the delay of the claimant in delivering the said gun carriages hereinbefore set forth.

Conclusion of Law.

"Upon the foregoing findings of fact the court decides, as a conclusion of law, that the claimant recover judgment in [the sum of twenty-one thousand dollars ($21,000)."

Mr. Justice PECKHAM, after making the foregoing statement, delivered the opinion of the Court.

It is objected on the part of the company that as the contract in question is, as asserted, plain and unambiguous in its terms, no reference can be made to other evidence or to documents which do not form part of the contract. The general rule that prior negotiations are merged in the terms of a written contract between the parties is referred to, and it is insisted that under that rule the various letters passing between the parties prior to the execution of the contract are not admissible.

The rule that prior negotiations are merged in the contract is general in its nature, and, we think, does not preclude reference to letters between the parties prior to the execution of the contract in this case. The language employed in this contract for a deduction, in the discretion of the Chief of Ordnance, of $35 per day from the price to be paid for each day of delay in the delivery of each gun carriage, respectively, taken in connection with the subject matter of the contract, leaves room for the construction of that language in order to determine which was intended, a penalty or liquidated damages. While it is claimed that there is really no doubt as to the proper construction of the contract, even if the contract alone is to be considered, yet we think that much light is given as to the true meaning of language that is not wholly free from doubt by a consideration of the correspondence between the parties before the final execution of the contract itself. Under such circumstances we think it never has been held that recourse could not be had to the facts surrounding the case and to the prior negotiations for the purpose of determining the correct construction of the language of the contract. (*Simpson* v. *United States*, 199 U. S. 397–399.) In *Brawley* v. *United States* (96 U. S. 168–173) the court says: "Previous and contemporaneous transactions may be all very prop-

erly taken into consideration to ascertain the subject matter of a contract and the sense in which the parties may have used particular terms."

It is not for the purpose of making a contract for the parties, but to understand what contract was actually made, that in cases of doubt as to the meaning of language actually used prior negotiations may sometimes be referred to.

There has in almost innumerable instances been a question as to the meaning of language used in that part of a contract which related to the payment of damages for its non-fulfillment, whether the provision therein made was one for liquidated damages or whether it meant a penalty simply, the damages to be proved up to the amount of the penalty. This contract might be considered as being one of that class where a doubt might be claimed, if nothing but the contract were examined. The courts at one time seemed to be quite strong in their views and would scarcely admit that there ever was a valid contract providing for liquidated damages. Their tendency was to construe the language as a penalty, so that nothing but the actual damages sustained by the party aggrieved could be recovered. Subsequently the courts became more tolerant of such provisions, and have now become strongly inclined to allow parties to make their own contracts, and to carry out their intentions, even when it would result in the recovery of an amount stated as liquidated damages, upon proof of the violation of the contract, and without proof of the damages actually sustained. This whole subject is reviewed in *Sun Printing & Publishing Association* v. *Moore*, (183 U. S. 642, 669,) where a large number of authorities upon this subject are referred to. The principle decided in that case is much like the contention of the Government herein. The question always is, what did the parties intend by the language used? When such intention is ascertained it is ordinarily the duty of the court to carry it out. See also *Clement* v. *Cash*, (21 N. Y. 253, 257;) *Little* v. *Banks*, (85 N. Y. 258, 266.)

The Government at the time of the execution of this contract (which was dated April 4, 1898) was making preparation for the expected war with Spain, which was imminent, and which was declared by Congress a few days thereafter. The Government was evidently desirous of obtaining the construction of these gun carriages as early as it was reasonably possible, and it was prepared to pay an increased price for speed. The acceptance of the proposal at the highest price for the delivery of the carriages in the shortest time is also evidence of the importance with which the Government officers regarded the element of speed. There can be no doubt as to its importance in their opinion, or that such opinion was communicated to the company. In the light of this fact an examination of the language of the contract itself upon the question of deductions for delay

in delivery renders its meaning quite plain. It is true that the word "penalty" is used in some portions of the contract, although in the clause providing for the $35 per day deduction that word is not used, nor are the words "liquidated damages" to be found therein. The word "penalty" is used in the correspondence, even by the officers of the Government, but we think it is evident that the word was not used in the contract nor in the correspondence as indicative of the technical and legal difference between penalty and liquidated damages. It was used simply to provide that the amount named might be deducted if there were a delay in delivery. Either expression is not always conclusive as to the meaning of the parties. (*Little* v. *Banks*, 85 N. Y. *supra; Ward* v. *Hudson River Building Co.*, 125 N. Y. 230.) What was meant by the use of the language in question in this case is rendered, as we think, still more certain by the manner in which the $35 per day was arrived at, as stated in the letters of the officers representing the Government, which were examined and criticised by the company before the signing of the contract. The correspondence shows that the sum was arrived at by figuring the average difference in time of delivery between the price bid for slow delivery of the carriages and the price under the accepted bid, the department saying "that this average difference should be the prescribed penalty."

Having this question before them and the amount stated arrived at in the manner known to both parties, we think it appears from the contract and the correspondence that it was the intention of the parties that this amount should be regarded as liquidated damages, and not technically as a penalty. This view is also strengthened when we recognize the great difficulty of proving damage in a case like this, regard being had to all the circumstances heretofore referred to. It would have been very unusual to allow the company to obtain the contract for the construction of these carriages, and yet to place it under no liability to fulfill it as to time of delivery, specially agreed upon, other than to pay only those actual damages (not exceeding $35 per day) that might be proved were naturally and proximately caused by the failure to deliver. The provision under such circumstances would be of no real value. The circumstances were such that it would be almost necessarily impossible to show what damages (if any) might or naturally would result from a failure to fulfill the contract. The fact that not very long after the contract had been signed and the war with Spain was near its end, the importance of time as an element largely disappeared, and that practically no damage accrued to the Government on account of the failure of the company to deliver, cannot affect the meaning of this clause as used in the contract nor render its language substantially worthless for any purpose of security for the proper performance of the contract as to time of delivery.

The amount is not so extraordinarily disproportionate to the damage which might result from the failure to deliver the carriages, as to show that the parties must have intended a penalty and could not have meant liquipated damages. If the contract were construed as contended for by the company, it would receive (as events have turned out) the highest price for the longest time in which to deliver, which could not have been contemplated by either party. This would result from the finding that no damages in fact flowed from the failure to deliver on time.

The eighth finding of the Court of Claims is in effect that the failure to deliver was caused in part by both parties; that the total number of days failure was 1,096 days, of which 496 were caused by the defendant's officers, and it does not mean that the court regarded itself as bound by the decision of the Chief of Ordnance as to the number of days that the claimant or the Government delayed the delivery. It found the number of days as stated, and that the transactions were so involved that whether the defendant should be charged with a greater proportion of the delays than set forth in the finding, the court could not decide on the evidence produced.

The judgment of the Court of Claims must be reversed and the cause remanded with directions to dismiss the petition.

Reversed.

True copy.

Test:

Clerk Supreme Court, U. S.